FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS AND ORDERS

JANUARY 1, 1986 TO JUNE 30, 1986

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MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JANUARY 1, 1986 TO JUNE 30, 1986

DANIEL OLIVER, *Chairman*
Took oath of office April 21, 1986

TERRY CALVANI, *Acting Chairman**
Took oath of office November 18, 1983

PATRICIA P. BAILEY, *Commissioner*
Took oath of office October 29, 1979

MARY L. AZCUENAGA, *Commissioner*
Took oath of office November 27, 1984.

ANDREW J. STRENIO, JR., *Commissioner*
Took oath of office March 17, 1986.

EMILY H. ROCK, *Secretary*
Appointed April 17, 1983

*From October 7, 1985 to April 20, 1986.

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IN THE MATTER OF

NATIONAL TALENT ASSOCIATES, INC., ET. AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8960. Consent Order, Nov. 26, 1975–Modifying Order, Jan. 21, 1986

The Federal Trade Commission has modified a 1975 consent order with National Talent Associates, Inc., et al. (86 F.T.C. 1202), amending the provisions of the order that tell the company what disclosures it must make to consumers about its success in obtaining paid employment for clients. The consent order prohibited the respondents from misrepresenting their ability to obtain modeling positions for young children and required them to disclose specified information to prospective clients.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 20, 1985, National Talent Associates, Inc., a New Jersey corporation; National Talent Associates, Inc., an Illinois corporation; National Talent Associates, Inc., a California corporation; and Sanford Storm and Jerome P. Ashfield, individually and as officers of said corporations (Petitioners) filed a request to reopen and modify the consent order entered against them by the Commission on November 26, 1975, in Docket No. 8960 (86 F.T.C. 1202).*

The request to reopen and modify the consent order was placed on the public record on September 20, 1985, and a press release regarding the request was issued on October 2, 1985. The public comment period ended on November 1, 1985, and no comments were filed. The deadline to rule on Petitioners' request was January 20, 1986.

Petitioners sell five year contracts to parents of young children under which they arrange to have the children photographed annually for five years. They then submit the photographs to talent agencies for consideration for employment as models. The order prohibits various misrepresentations including those relating to the employment opportunities and potential earnings available to children placed under their contracts. It further imposes affirmative obligations on

* Other respondents under the order are not bound by Part I of the order, with which the petition is concerned, and are not Petitioners.

Petitioners, including a requirement that they give to each prospective purchaser an "*Important Information*" document disclosing the number of children signed to their contracts during the immediately preceding two calendar year period, and information reflecting the success rates of these children in the modeling business.

Petitioners requested that several paragraphs of Part I of the order be modified or replaced with new paragraphs and that three new paragraphs be added to the order. They assert that changed conditions of fact since the order was issued require that Paragraph 13 be modified. They state further that the public interest requires that the first and second "*It is further ordered*" paragraphs of the order be replaced with new paragraphs and that new third, fourth and fifth "*It is further ordered*" paragraphs be placed in the order.

Paragraph 13 of the Order

Under Paragraph 13 of the order, Petitioners are prohibited from representing that:

> National Talent Associates, Inc., a New Jersey corporation, arranges for professional photographs to be taken of each person placed under its contract by an independent photographic studio.

Petitioners state that at the time that the order was issued, the individual respondents owned an interest in a photographic studio. This is no longer true, and Petitioners now arrange for NTA clients to have photographs taken by independent photographic studios. Based on this changed condition of fact, Petitioners ask that the words, "unless such is in fact true", be added to the end of the paragraph.

The Commission agrees with the Petitioners that Paragraph 13 should be modified to reflect the stated changed factual condition. Petitioners should not be prohibited from making a truthful representation. If they acquire an interest in a photographic studio to which they refer clients in the future, the modified paragraph would prohibit them from representing that the photographic studio is an independent photographic studio.

First "It is further ordered" Paragraph of the Order

Petitioners ask that the first "*It is further ordered*" paragraph of the order, with the exception of the last subparagraph therein, be replaced with a new first "*It is further ordered*" paragraph. The first "*It is further ordered*" paragraph reads as follows:

> *It is further ordered*, That respondents shall disclose the following information, in writing, in a clear and conspicuous manner to each person who is a prospective purchas-

er of any of their products or services, prior to entering into any agreement for the furnishing of such products or services, including the photographing of, or assistance to, any such persons in seeking or obtaining employment opportunities as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

a. The number of persons who contracted with respondents for the purchase of photographs or services to be used in connection with the selection, placement or employment of persons in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers, within the two calendar years immediately preceding the year in which the prospective purchaser was contacted, the number and percentage of such persons who obtained paid employment through the auspices of respondents, as well as the number of paid jobs and agency contracts obtained by such persons.

b. The total number of persons placed under contract by respondents in each of the following categories of gross annual earnings, derived from paid employment in the commercial advertising, talent, modeling or entertainment industries, as models, actors, actresses or entertainers, during the two calendar years immediately preceding the year in which the prospective purchaser was contacted by respondents: Under $100, $100–$250, $250–$500, $500–$1,000, $1,000–$2,000, $2,000–$4,000, $4,000–$6,000, $6,000–$8,000, $8,000–$10,000, $10,000 and above.

c. Whether any financial agreement, arrangement or connection, exists between respondents and any photographic studio to which they may refer prospective purchasers of their photographs or services.

d. Whether any financial agreement, arrangement or connection, exists between respondents and any person, firm or agency to whom photographs, or any other information, concerning the prospective purchaser, of their products or services may be sent by respondents.

e. The source or sources from which the names, addresses, or any other information about prospective purchasers, or about any other members of their immediate family, was obtained by respondents.

Petitioners' proposed first "*It is further ordered*" paragraph of the order would effect several significant changes in the "*Important Information*" document. The document now relates to the success rates of children signed by NTA during the immediately preceding two calendar years. The modified paragraph would change the time period covered to the immediately preceding five calendar years. Petitioners argue that the information required to be disclosed does not accurately reflect NTA client opportunities during the term of their contracts with NTA. "Of significant importance", Petitioners state, "NTA's agreements with clients are for five years; whereas, the order provisions require disclosure for two years. Depending on the date on which a client is signed during the two-year period, it is often impossible for a client to be processed by NTA, signed by a talent agency, obtain a job assignment and receive payment for the assignment in sufficient time to be included in all subparagraph a. data disclosure categories." Thus, to make the data more relevent to prospective

purchasers, Petitioners propose to enlarge the two year period to five years.

The items of information to be disclosed on the "*Important Information*" document would be reduced from five to three. The order requires the disclosure of the number of children signed to NTA contracts, the number of these children who were accepted by talent agencies, the number and percentage who obtained paid employment, the number of paid job assignments that they obtained and their earnings. Data concerning the number who were accepted by talent agencies and the number of paid job assignments that they obtained would no longer be disclosed. According to the Petitioner, these items of information are confusing and not easily relatable to the total number of persons contracting with NTA. Furthermore, the Petitioners assert that this data is extremely burdensome to compile.

The disclosure of earnings prescribed by subparagraph b. of the first "*It is further ordered*" paragraph would be substantially altered by Petitioners' proposed modification. The proposed categories of gross annual earnings are as follows: under $500, $500–$5,000, $5,000–$10,000 and above $10,000. Additionally, cumulative earnings would be permitted rather than annual earnings during the five calendar year period. In support of this modification, Petitioners assert that the public interest requires the elimination of unnecessary detail, and the four categories of earnings are more concise and easier to understand. Additionally, Petitioners argue that the physical counting and compilation of this data has been extremely burdensome and costly to NTA. To continue the ten categories of earnings with five year computations would be even more burdensome.

Petitioners' proposed modifications would permit two footnotes to be placed on the "*Important Information*" document. A footnote to items one and two, the number of persons signed to NTA's contracts and the number and percentage of those persons who received payment for employment, would read:

> Of the children signed during the past five years, only a few have had the opportunity to complete the full term of their five-year agreement.

A footnote to item three, the number of persons who earned income and their gross earnings, would read:

> These figures do not include those children signed by NTA prior to *(Year)* who received earnings during the past five years.

Petitioners state that the footnotes are needed to "further clarify and explain the coverage of items, 1, 2 and 3 on the disclosure document."

Subparagraph c. of the first "*It is further ordered*" paragraph requires Petitioners to disclose whether "any financial agreement, arrangement or connection exists between Petitioners and any photographic studio to which they may refer prospective purchasers of their photographs or services." Subparagraph d. requires the disclosure of any such arrangement with firms or agencies to whom photographs, or any other information concerning prospective purchasers of their photographs or services are sent. Petitioners ask that subparagraphs c. and d. be combined into subparagraph (4) in the paragraph that they propose. These disclosures would be necessary only if such financial arrangements exist. Petitioners assert that the public interest requires this modification for clarification purposes.

The Commission has concluded that, taken together, the modifications proposed by Petitioners to the first "*It is further ordered*" paragraph of the order serve the public interest. The "*Important Information*" document does not accurately reflect the success rates of Petitioners' clients if it is limited to only two of the five years that they are under contract. Moreover, some less significant information would be eliminated. The essential information is the number of children signed to Petitioners' contracts, the number and percentage who obtained employment and their earnings. This information would be retained. Similarily, the reduction of categories of income from ten to four serves to make the document more concise and understandable. Unless a financial agreement, arrangement or connection exists between Petitioners and the photographic studios to whom they refer clients or the talent agencies to whom the photographs are submitted, there is no need to clutter the document with the disclosures required by subparagraphs c. and d. of the order. The footnotes, which would be permitted to appear on the document, would assist prospective purchasers in understanding the statistical data. Finally, the modified order paragraph is clearly drafted, and ambiguities have been eliminated.

Last Subparagraph of the First "It is further ordered" Paragraph and the Second "It is further ordered" Paragraph of the Order

Petitioners request further that the order be modified by deleting therefrom the last subparagraph of the first "*It is further ordered*" paragraph and the second "*It is further ordered*" paragraph and replacing them with the second "*It is further ordered*" paragraph set forth in their petition. The subparagraph and paragraph proposed to be deleted from the order are:

At the time when the foregoing disclosures are made, respondents shall furnish the prospective purchaser of any of their products or services with a retainable duplicate

copy of the disclosure document, and secure from such prospective purchaser a signed acknowledgment of the receipt thereof on the properly dated original copy. The document containing the disclosures shall be headed "*Important Information*", and shall not contain information or representations other than those set forth above.

It is further ordered, That respondents maintain, for a five year period following the execution thereof, the originals of the signed acknowledgments of receipt of the disclosures described in the preceding paragraphs and make them available for examination and copying, if necessary, by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

The modification requested by respondents would replace the words, "prospective purchaser", with the word, "purchaser". Additionally, respondents' representative would be required to sign the copy of the "*Important Information*" document that is retained for Commission staff inspection.

The Commission considers the proposed modifications, taken together, to be in the public interest. The first subparagraph of the proposed first "*It is further ordered*" paragraph retains the obligation to give the "*Important Information*" document to each prospective purchaser of Petitioners' services. However, enforcement problems are brought about by a requirement that a signed acknowledgment of receipt be retained from each prospective purchaser. Additionally, the requirement that respondents' representative must also sign the copy of the document that is retained for staff inspection should serve to make those representatives aware of the importance of the document and the need to obtain a signed acknowledgment of receipt from each purchaser and to retain it.

Proposed Third "It is further ordered" Paragraph of the Order

Petitioners ask that a new third "*It is further ordered*" paragraph be placed in the order. It would prohibit them from making any claim or other representation, in advertising or promotional material, or in any oral sales presentation, that contradicts any of the information required to be disclosed in the "*Important Information*" document. In the view of the Commission, the public interest requires this prohibition to prevent overstatements of the employment opportunities and financial gains that may be anticipated by purchasing Petitioners' services.

Proposed Fourth "It is further ordered" Paragraph of the Order

A new fourth "*It is further ordered*" paragraph, which Petitioners request be placed in the order, would permit Petitioners to have up to sixty days after the close of each calendar year to update the "*Important Information*" document for the immediately preceding five calendar year period. In compiling the information required in

the first item of information on the disclosure document, a tolerance of one quarter of one percent would be permitted and a tolerance of one percent would be permitted in compiling the information for the third item of information, if such variances resulted from a good faith effort to accurately compile the required information.

In support of their request that the order be modified by adding the above-described paragraph, Petitioners contend that the public interest requires the "collection, assimilation and dissemination of accurate data; however, contrary to the public interest, the order does not allow sufficient time to collect the required data nor provide for good faith human error in assembling the data for display on the "*Important Information*" document. The proposed order paragraph, Petitioners continue, "takes into account the necessary time needed to accurately complete the '*Important Information*' document and allows for good faith error, should the physical counting and compilation of statistical data (including determining five year cumulative earnings figures for each eligible client) result in insignificant errors."

We agree with Petitioners that adequate time should be provided in the order to update the information on the "*Important Information*" document from one calendar year to the next. The sixty days requested by Petitioners is reasonable. We agree also that small tolerances should be permitted for errors made in good faith in compiling the statistical data showing the number of children signed to their contracts and their earnings. No tolerance would be permitted for the information showing the number and percentage who were successful in being employed through Petitioners' auspices since this information involves fewer numbers and less difficult calculations.

Proposed Fifth "It is further ordered" Paragraph of the Order

Petitioners further request that a fifth "*It is further ordered*" paragraph be placed in the order. It would require Petitioners to "maintain, and, upon request, make available to the Federal Trade Commission records substantiating the statistical information contained in each '*Important Information*' document then in use." As the "*Important Information*" document relates to a period of five calendar years, the records substantiating the information would be maintained for five years. Petitioners assert that the proposed fifth "*It is further ordered*" paragraph is in the public interest as it provides "additional compliance safeguards by establishing data substantiation and record keeping requirements which will allow the Commission's staff to effectively monitor Respondents' compliance with the first "*It is further ordered*" provision.

The Commission has concluded that the public interest clearly requires that records substantiating the information on the "*Important*

Information" document be maintained for compliance monitoring purposes.

Conclusions

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), requires that an order be modified or set aside upon a satisfactory showing that changed conditions of law or fact require that the order be altered, modified or set aside. The Commission's rules implementing this statute amplify on this by providing that an order should be altered, modified or set aside if "the public interest so requires." The Commission has concluded that Petitioners have adequately shown that changed conditions of law and public interest considerations require that the order be modified in the manner requested by Petitioners.

The "*Important Information*" document, if prepared in accordance with the terms of the modified order, will more accurately reflect the success rates of Petitioners' clients. By the elimination of unnecessary information, the document will be more understandable and meaningful to prospective purchasers of Petitioners' services. The burden and expense of compiling the statistical data for the document will also be substantially reduced. Moreover, the modifications strengthen the order by requiring substantiation for the information on the "Important Information" document and prohibiting representations that may contradict this information.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on November 26, 1975, is hereby modified to read as follows:

ORDER

I

It is ordered, That National Talent Associates, Inc., New Jersey, Illinois and California corporations, their successors and assigns, and Sanford Storm and Jerome P. Ashfield, individually and as officers of said corporations, and said respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of products or services in connection with the placement and employment of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith

cease and desist from representing, directly or indirectly, orally or in writing, that:

1. Respondents have received information that a person may possess the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

2. Referrals from past purchasers of their products or services are a significant source from which the names of potential purchasers have been obtained.

3. Respondents have obtained the names of potential purchasers from a source which cannot be divulged.

4. Respondents, when requested, will provide persons with the source from which the information referred to in their solicitation letters, solicitation phone calls, or in any other means of solicitation was obtained and the nature of such information, unless respondents provide such information when requested.

5. National Talent Associates, Inc. has the expertise essential for the judging and selection of the most qualified persons to be used as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

6. National Talent Associates' salesmen, agents or representatives have the expertise essential to select and judge the suitability of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries.

7. Persons who prior to an in-person interview have been solicited by National Talent Associates, Inc., have been selected on the basis that they may have the necessary personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

8. The majority of National Talent Associates' income is derived from its personal management contracts and its ability to place persons under contract with the leading advertising, modeling, talent or entertainment agencies.

9. Persons are selected and offered contracts by National Talent Associates, Inc., only on the basis that they may possess the personal or physical characteristics or other qualifications suitable for success in the commercial advertising, talent, modeling or entertainment industries.

10. A person's chances for selection by Monica Stuart, the William Schuller Agency, Inc., or by any person or agency, will be aided, increased or enhanced, by entering into a contract with National Talent Associates, Inc.

11. Access to Monica Stuart or to the William Schuller Agency, Inc.,

is available only to persons who contract with National Talent Associates, Inc.

12. Monica Stuart or the William Schuller Agency, Inc., review photographs of only those persons who have contracted with National Talent Associates, Inc.

13. National Talent Associates, Inc., a New Jersey corporation, arranges for professional photographs to be taken of each person placed under its contract by an independent photographic studio, unless such is in fact true.

14. Persons who contract with National Talent Associates, Inc. will receive annually one black and white, 8 × 10 inch, photograph of children in the family not under contract, for a five year period, or for any period in excess of the period in which said photograph is received without any obligation to purchase additional photographs at an added cost.

15. Natural color photographs of persons who contract with National Talent Associates, Inc. are submitted annually, for a five year period, or for any period in excess of the period in which said photographs are submitted to Monica Stuart or to the William Schuller Agency, Inc. for her or their consideration and review, without disclosing that, unless the person comes back for rephotographing annually for a five year period, such person's photographs will not be resubmitted to Monica Stuart or to the William Schuller Agency, Inc.

16. National Talent Associates, Inc. photographs other persons in a family in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.

17. The remuneration received by Monica Stuart of the William Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc.

18. Persons placed under contract by National Talent Associates, Inc. can reasonably anticipate significant or substantial earnings from paid employment in the commercial advertising, talent, modeling or entertainment industries as models, actors, actresses, or entertainers.

19. Persons who contract with National Talent Associates, Inc. may reasonably anticipate earning sums of money sufficient to provide for a college education or for any other such formal education.

20. A person's chances for selection as a model, actor, actress or

entertainer by the commercial advertising, modeling, talent or entertainment industries is, in any way, enhanced solely because he or she is Black, Oriental, has red hair, freckles or because of his or her size, age or any other specific racial or personal characteristics.

It is further ordered, That respondents shall disclose clearly and conspicuously to each prospective purchaser of their services, prior to entering into any agreement for the furnishing of such services, the following information in a written document entitled "*Important Information*":

(1) The total number of persons signed to contracts and accepted by respondents during the five (5) calendar years immediately preceding the year in which the prospective purchaser is contacted; provided, however, such total number may also be broken down by individual calendar year so long as the total number for the five (5) calendar years appears with such calendar year breakdown;

(2) The number and percentage of those persons in (1) above, who received payment for employment;

(3) The number of persons in (1) above who earned income and their cumulative gross earnings during the five (5) calendar years immediately preceding the year in which the purchaser is contacted, in each of the following categories: under $500, $500–$5,000, $5,000–$10,000, and above $10,000;

(4) Any financial agreement or affiliation between respondents and (a) any photographic studio to which they may refer purchasers of their services, and/or (b) any person, firm or agency to whom photographs, or any other information, concerning purchasers of their services may be sent by respondents;

(5) The source or sources from which the names, addresses, or any other information about prospective purchasers, or about any other members of their immediate family, was obtained by respondents;

and shall disclose in such "*Important Information*" document no other statistical data or information except (a) the name and addresses of National Talent Associates; (b) the following footnote relating to (1) and (2) above:

Of the children signed during the past five years, only a few have had the opportunity to complete the full term of their five-year agreement.

and (c) the following footnote relating to (3) above:

These figures do not include those children signed by NTA prior to *(Year)* who received earnings during the past five years.

It is further ordered, That respondents shall provide to each pur-

chaser of their services a retainable copy of the "*Important Information*" document, and secure from each such purchaser a signed and dated copy of such document containing an acknowledgment by the purchaser of having received such document, which shall also be signed by respondents' representative, and that respondents shall maintain each such signed and dated document for five years and, upon request, make them available to the Federal Trade Commission for inspection and copying.

It is further ordered, That respondents shall not, in advertising or promotional material, or in any oral sales presentation, make any claim or other representation that contradicts any of the information required to be disclosed in the "*Important Information*" document.

It is further ordered, That respondents shall have up to sixty (60) days after the close of each calendar year to compile and update the "*Important Information*" document for the immediately preceding five-calendar-year period; *provided, however,* no "*Important Information*" document shall be given to any prospective purchaser after sixty (60) days from the beginning of each calendar year that does not disclose the information required to be disclosed by (1) through (5) above for the immediately preceding five-calendar-year period. In compiling the information required in (1) and (3) above, it shall not be a violation of this order if the figures in (1) vary by one-quarter (¼) of one percent (1%) and the figures for (3) vary by one percent (1%), if such variances resulted from a good faith effort to accurately compile the required information.

It is further ordered, That respondents maintain, and upon request, make available to the Federal Trade Commission records substantiating the statistical information contained in each "*Important Information*" document then in use.

It is further ordered, That, if any representations are made by the respondents, their salesmen, representatives or agents, either expressly or impliedly, orally or in writing, pertaining to any standards, qualifications or characteristics which a person must meet or possess before respondents will agree to place such a person under contract, photograph them or otherwise assist or render services to said person, respondents shall maintain complete and detailed records as to such persons who have failed to meet or possess such standards, qualifications or characteristics, including their names, addresses, date of rejection, and the reason or reasons for their rejection by respondents. Such records shall be made available for examination and copying if necessary, by a duly authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

It is further ordered, That the respondents named in Part I of this order shall submit to respondents Monica Stuart and the William

Schuller Agency, Inc., for their inspection and evaluation, copies of all written promotional or sales materials, including but not limited to sales solicitation letters, contract forms, brochures, flyers, and sales presentation scripts. Said respondents will submit said materials to Monica Stuart and the William Schuller Agency, Inc., on a continuing basis whenever there is a change, revision or modification of any of the materials.

It is further ordered, That respondents shall cease and desist from:

a. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.,* Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

b. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "*Notice of Cancellation*", which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.,* Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter the date of transaction)

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION

NOTICE AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. (Amended November 1, 1973).

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO (Name of seller), AT (*address of seller's place of business*) NOT LATER THAN MIDNIGHT OF _____.
(Date)

I HEREBY CANCEL THIS TRANSACTION.

_____
(Date)

_____
(Buyer's signature)

c. Failing, before furnishing copies of the "*Notice of Cancellation*" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

d. Including in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this Rule including specifically his right to cancel the sale in accordance with the provisions of this Rule.

e. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

f. Misrepresenting in any manner the buyer's right to cancel.

g. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

h. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

i. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon a showing of inconsistency, shall make such modifications as may be warranted in the premises.

II

It is ordered, That William Schuller Agency, Inc., a corporation, its successors and assigns, and Monica Stuart, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of products or services in connection with the placement and employment of persons as models, actors, actresses or entertainers in the commercial advertising, talent, modeling or entertainment industries, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing to consumers, directly or indirectly, orally or in writing, that:

1. A person's chances for selection by Monica Stuart, the William Schuller Agency, Inc. or by any person or agency, will be aided, in-

creased or enhanced by entering into a contract with National Talent Associates, Inc.

2. Access to Monica Stuart or to the William Schuller Agency, Inc. is available only to persons who contract with National Talent Associates, Inc.

3. Monica Stuart or the William Schuller Agency, Inc., review photographs of only those persons who have contracted with National Talent Associates, Inc.

4. National Talent Associates, Inc. photographs other persons in a family in addition to the person whose name appears on its contract, solely for the purpose of submitting said photographs to Monica Stuart of the William Schuller Agency, Inc. for her evaluation of their potential for the commercial advertising, modeling, talent or entertainment industries.

5. The remuneration received by Monica Stuart of the William Schuller Agency, Inc., in connection with her consideration and review of photographs submitted to her by National Talent Associates, Inc., is derived solely from a percentage of the earnings of persons selected by her and placed under contract by the William Schuller Agency, Inc.

6. Natural color photographs of persons who contract with National Talent Associates, Inc. are submitted annually, for a five year period, or for any period in excess of the period in which said photographs are submitted to Monica Stuart or to the William Schuller Agency, Inc. for her or their consideration and review without disclosing that, unless the person comes back for rephotographing annually for a five year period, such person's photographs will not be resubmitted to Monica Stuart or to the William Schuller Agency, Inc.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall maintain complete and detailed records as to the number of persons whose photographs were submitted to them by any of the respondents set forth under Part I of the order herein, and the number of such persons who have failed to meet or possess the standards, qualifications or characteristics which a person must meet or possess before respondents herein will agree to place such a person under contract, or otherwise assist or render services to said person, including their names, place of residence, and month and year of rejection. Such records shall be made available for examination and copying if necessary by an authorized representative of the Federal Trade Commission, upon reasonable notice, during normal business hours.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall inspect and evaluate the written promotional and sales material submitted to them by respondents named in

Part I of this order. Within 30 days of their receipt of said materials, respondents Monica Stuart and William Schuller Agency, Inc. shall notify said other respondents, in writing as to any comments, complaints they might have, or any corrections they might require, concerning any representations relating to them contained in the materials submitted. Monica Stuart and William Schuller Agency, Inc. shall simultaneously submit to the New York Regional Office a copy of such notification to the respondents named in Part I of this Order.

It is further ordered, That respondents Monica Stuart and William Schuller Agency, Inc. shall notify the Federal Trade Commission, in writing, of any consumer complaints received by them concerning any of the respondents named in Part I of this order. Such notification shall be made to the New York Regional Office within 30 days after receipt of the consumer complaint. This provision shall apply only to those complaints about representations by or practices of the respondents named in Part I which relate to respondents Monica Stuart and William Schuller Agency, Inc.

III

For the purposes of the following provisions of this order, unless otherwise specified, the term *respondents* shall include each of the respondents named heretofore in this order.

It is further ordered, That respondents William Schuller Agency, Inc. and Monica Stuart shall forthwith deliver a copy of this order or a memorandum incorporating its provisions to all present and future employees engaged in the sale of said respondents' products or services and shall secure from each such person a signed statement acknowledging receipt of a copy of this order or the memorandum.

It is further ordered, That corporate respondents National Talent Associates, Inc. and individual respondents Sanford Storm and Jerome P. Ashfield shall forthwith deliver a copy of this order or a memorandum incorporating its provisions to all present and future salesmen or other employees engaged in the sale of said respondents' products or services and shall secure from each such salesman or employee a signed statement acknowledging receipt of a copy of this order or the memorandum.

It is further ordered, That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each individual respondent shall promptly notify the Commission of any discontinuance of his or her present business or employment and of his or her affiliation with any new

business or employment. Such notice shall include such respondent's current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

It is further ordered, That corporate respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other changes in the corporations which may affect compliance obligations arising out of this order.

It is further ordered, That the respondents shall within sixty days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

WYOMING STATE BOARD OF REGISTRATION IN PODIATRY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3176. Complaint, Jan. 24, 1986—Decision, Jan. 24, 1986

This consent order requires the Wyoming State Board of Registration in Podiatry ("Board"), among other things, to cease restricting or discouraging podiatrists from truthfully advertising their goods and services by: (1) adopting rules or policies prohibiting such advertising; (2) suspending or revoking podiatrists' licenses as a result of such advertising; or (3) declaring such advertising illegal or unethical. Under the terms of the order, the Board is allowed to prohibit and enforce restrictions that ban false or misleading ads or to seek legislation related to the practice of podiatry.

Appearances

For the Commission: *Jack Young* and *Cynthia Wicker.*

For the respondent: *Gay Woodhouse,* Cheyenne, Wyo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the Wyoming State Board of Registration in Podiatry ("Board") has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

Respondent

1. Respondent Wyoming State Board of Registraton in Podiatry is organized, exists and transacts business under the laws of the State of Wyoming. The Board's principal office and place of business is located at the office of Curtis Deming, D.P.M., its Secretary-Treasurer, at 50 East Loucks, Suite 202, Sheridan, Wyoming. The Board is subject to the Commission's jurisdiction pursuant to Section 5 of the Federal Trade Commission Act.

2. Membership on the Board is limited to podiatrists. The Board is composed of three podiatrists who are appointed by the governor to staggered three year terms. Wyo. Stat. § 33–9–102.

3. The Board has exclusive authority to license podiatrists in Wyoming. It is unlawful to practice podiatry in Wyoming without first obtaining a license from the Board. Wyo. Stat. §§ 33–9–103, 104, 105.

4. The Board is authorized to adopt rules and regulations governing the examination and licensing of podiatrists in the state. Wyo. Stat. § 33–9–105. The Board is further authorized to revoke or refuse to renew the license of any podiatrist who is found guilty of the following offenses: obtaining a license by fraudulent representation, use of untruthful or improbable statements in advertisements, incompetency, alcoholism or habitual use of controlled substances, and engaging in unprofessional conduct. Wyo. Stat. § 33–9–110. The Board is not authorized to discipline podiatrists for other violations or to adopt rules establishing additional grounds for disciplinary action.

5. By law all Board members must have practiced podiatry in Wyoming for the two years preceding their appointment to the Board, and members must continue to practice podiatry while on the board. Board members spend a relatively small percentage of their time on Board matters, and compensation is limited to reimbursement for per diem, mileage and expenses for attending meetings, and other necessary incidental expenses. Wyo. Stat. § 33–9–112.

6. Except to the extent that competition has been restrained as alleged herein, podiatrists in Wyoming compete with one another and Board members who are podiatrists compete with other podiatrists they regulate.

7. In the conduct of their business, podiatrists in Wyoming advertise in media having interstate circulation, receive and treat patients from other states, receive substantial sums of money that flow across state lines from the federal government and from private insurers for rendering podiatric services, prescribe or administer medicines that are shipped in interstate commerce, and use supplies and equipment that are shipped across state lines. The acts and practices described below are in interstate commerce, or affect these and other interstate activities, and are in or affect commerce within the meaning of Section 5 (a)(1) of the Federal Trade Commission Act. 15 U.S.C. 45(a)(1).

State Policy Concerning Podiatric Advertising

8. The State of Wyoming does not restrict competition among podiatrists except by authorizing the Board to establish standards for licensing podiatrists, and by disciplining them for the offenses described above.

9. There are no Wyoming Statutes indicating that the state intended to restrict or supplant competition among licensed podiatrists or to restrict truthful advertising by podiatrists. The only authority to prohibit the use of "untruthful or improbable statements" in adver-

tisements. Wyo. State. § 33–9–110(a)(iii). The State of Wyoming has thereby expressly denied the Board any authority to regulate truthful advertising.

10. The State of Wyoming gives the Board no discretion to adopt rules other than those necessary to conduct examinations and issue licenses.

Board Conduct

11. Despite the fact that state law does not authorize the Board to restrict truthful advertising, the Board has restrained competition among podiatrists in Wyoming by combining or conspiring with its members or others, or by acting as a combination of its members or others, to restrict unreasonably the dissemination by podiatrists of truthful, nondeceptive information. In furtherance of this combination or conspiracy, the Board has engaged in the following acts or practices without statutory authorization:

A. Adopted Principles of Professional Conduct for Podiatrists, which state that "[t]he use of advertising in any form to solicit patients is inconsistent with [the podiatrist's] obligation."

B. Adopted a Code of Ethics that sets forth content restrictions on advertising by podiatrists in Wyoming. The Code permits advertising of little information beyond name, address, telephone number, office hours and limited descriptions of practice. These sections restrict advertising to office signs, telephone listings, newspapers, and direct mail announcements. They limit use of these media, stating for example, that newspapers and direct mailings may be used only to announce the opening of new offices or changes of address or telephone number. They also impose additional limitations on the use of media, including complete bans on radio and television advertising.

C. Intimidated and coerced or attempted to intimidate and coerce individual podiatrists into abandoning their efforts to advertise the availability of podiatric services, and coupons for free services. In so doing, the Board has not based its actions on a determination that the advertising was false or deceptive.

D. Directed competing podiatrists in one town to conspire for the purpose of establishing an agreement on the extent of advertising they would permit in their market.

12. By these and other means the Board has continued its anticompetitive course of conduct, despite the fact that the Board has known since at least 1982 that the restrictions contained in the Principles of Professional Conduct and Code of Ethics violated the law.

Consumer and Competitive Injury

13. The acts and practices described above have restrained and continue to restrain competition unreasonably and injure consumers in the following ways, among others:

A. Consumers and potential consumers of podiatric goods and services are deprived of the benefits of vigorous competition;

B. Consumers and potential consumers are deprived of truthful, useful information about podiatric goods and services;

C. Podiatrists are prevented from disseminating truthful information about their goods and services; and

D. Podiatrists are unreasonably restrained from competing in the market for podiatric goods and services, and restrained in their ability to make podiatric services fully and readily available to consumers needing such services.

14. The acts and practices described above constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices are continuing and will continue absent the entry of an order for appropriate relief.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its counsel and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, the Commission hereby issues its com-

plaint, makes the following jurisdictional findings and enters the following order:

1. The respondent is organized, exists and transacts business under the laws of the State of Wyoming, with its principal office and place of business located at the office of Curtis Deming, D.P.M., its Secretary-Treasurer, at 50 East Loucks, Suite 202, Sheridan, Wyoming.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For the purposes of this order, the following definitions shall apply:

A. *Board* shall mean the Wyoming State Board of Registration in Podiatry, its members, officers, agents, employees, successors and assigns.

B. *Disciplinary action* shall mean:

1. The refusal to grant, or the restriction, revocation or suspension of, a license to practice podiatry in Wyoming; the refusal to admit a person to examination for a license to practice podiatry; the issuance of a formal or informal warning, reprimand, censure, or cease and desist order against any person or organization; or the imposition of a fine, probation, or other penalty or condition; or

2. The initiation of an administrative, criminal, or civil court proceeding against any person or organization.

I.

It is ordered, That the Board, directly or indirectly, through any device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, impeding, or discouraging any person from advertising or publishing the prices, terms, conditions of sale, or other information concerning any podiatric service or product offered for sale or made available by any person or organization that may lawfully offer the service or product. Such actions include, but are not limited to:

1. adopting or maintaining any rule, regulation, policy, or course of conduct that has the purpose or effect of prohibiting, restricting, or

discouraging any person from advertising information about podiatric goods and services;

2. taking or threatening to take any disciplinary action against any person or organization for advertising information about podiatric goods and services;

3. declaring it to be an illegal, unethical, unprofessional, or otherwise improper practice for any person or organization to advertise information about podiatric goods and services; and

B. Inducing, urging, encouraging or assisting any podiatrist or any podiatric association, group of podiatrists, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

Provided that, nothing contained in this part shall prohibit the Board from formulating, adopting, disseminating and enforcing reasonable rules or taking disciplinary or other action to prohibit the use in advertising of statements that the Board reasonably believes are "untruthful or improbable" within the meaning of Wyo. Stat. § 33–9–110(a)(iii);

Provided further, That, this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the practice of podiatry.

II.

It is further ordered, That the Board shall:

A. Distribute by first-class mail a copy of the announcement attached hereto as Appendix A and a copy of this order:

1. Within thirty (30) days after the date this order becomes final, to each person licensed to practice podiatry in Wyoming on the date this order becomes final and to each person who has on such date a pending application for a license; and

2. Within thirty (30) days after a person applies for a license to practice podiatry in Wyoming, for a period of five (5) years after the date this order becomes final, to each such person;

B. For a period of five (5) years after this order becomes final, maintain and upon request make available to the Federal Trade Commission for inspection and copying, copies of all records relating to advertising, including but not limited to, written communications, and any summaries of oral communications to or from the Board regarding the offering, publishing or advertising of information about podiatric services;

C. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in

the Board's authority to regulate the practice of podiatry in Wyoming that may affect compliance obligations arising out of this order, such as the complete or partial assumption of that authority, the complete or partial assumption of that authority by another governmental entity, or the dissolution of the Board;

D. Within ninety (90) days after this order becomes final remove from its Principles of Professional Conduct, Code of Ethics and any other policy statement or guideline, any provision, interpretation or statement that is inconsistent with Part I of this order;

E. Within one hundred twenty (120) days after this order becomes final, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which the Board has complied with this order.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Wyoming State Board of Registration in Podiatry has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit podiatrists from advertising their services in a truthful or probable manner. The Board may not (1) adopt or maintain rules, regulations, or policies that prohibit truthful, probable advertising with respect to the sale of podiatric goods, or services, (2) take disciplinary action (such as the suspension or revocation of a certificate of license) or threaten disciplinary action against any person or organization so advertising or (3) declare it to be illegal or unethical for persons to so advertise. The Board is also prohibited from encouraging any podiatrist or any professional group or association to take actions that the order prohibits the Board from taking. The order does not affect the Board's authority to prohibit and discipline licensees for advertising that is untruthful or improbable.

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed. Further information may be obtained from the FTC by calling Jack L. Young at (202) 523-3596.

_____

[Title]
Wyoming State Board of Registration in Podiatry

IN THE MATTER OF

ROY B. KELLY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3177. Complaint, Feb. 4, 1986—Decision, Feb. 4, 1986

This consent order requires a former corporate officer of a Washington, D.C.-based employment counseling service, among other things, to cease misrepresenting: (1) the basis on which clients are accepted; (2) the number of clients who have obtained interviews, job offers, or jobs through respondent's services; and (3) the chances that the clients' fees would be refunded because the employer would likely pay the respondent a finder's fee. Additionally, respondent is required to have a reasonable basis for any placement claims he makes, and whenever such placement claims are made, to maintain records of his placements and make a composite of these records available to clients on request. Further, respondent is prohibited from accepting a fee until a client has obtained employment through respondent's services.

Appearances

For the Commission: *Walter C. Gross* and *E. Charles Lane.*

For the respondent: *Thomas R. Dyson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Roy B. Kelly, individually and as a former officer of John William Costello Associates, Inc. (JWCA), hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Roy B. Kelly was an officer of John William Costello Associates, Inc. The corporation's principal office and place of business was located at 1612 K Street, N.W., Washington, D.C.. John William Costello Associates, Inc., is a corporation organized, existing and formerly doing business under and by virtue of the laws of the District of Columbia. He directed, formulated and controlled the acts and practices of John William Costello Associates, Inc., including the acts and practices hereinafter set forth.

The aforementioned respondent Roy B. Kelly cooperated and acted

together along with others in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondent, until at least August 1982, engaged in the advertising, offering for sale, and sale of services to persons seeking employment. These services included, *inter alia,* providing advice, assistance and counseling to clients, preparing resumes for clients, preparing cover letters to prospective employers, identifying companies as prospective employers, and mailing resumes and cover letters to prospective employers. The cost of JWCA's services ranged from $2,500 to $25,000 and higher.

PAR. 3. Respondent advertised JWCA's services in newspapers of interstate circulation, in Washington, D.C. and in various states. Respondent solicited prospective clients for JWCA's services at regional sales offices located in various states and offered and sold its services at its principal office and place of business in Washington, D.C. Respondent maintained a substantial course of business, including the acts and practices as hereinafter set forth, which were in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of respondent's business, for the purpose of inducing prospective clients to purchase JWCA's services, respondent through various statements in newspaper advertisements and promotional materials and orally by JWCA's officers and sales representatives, represented, directly or by implication, that:

(1) Clients typically received several interviews with and job offers from prospective employers through the services of JWCA.

(2) The large majority of JWCA's previous clients obtained employment through the services of JWCA.

(3) Most of JWCA's clients received a refund, in whole or in part, of fees paid to JWCA.

(4) JWCA carefully screened prospective applicants and only accepted as clients those persons that JWCA could successfully place.

PAR. 5. In truth and in fact:

(1) Clients seldom received any interviews or job offers through JWCA's services.

(2) The large majority of JWCA's previous clients did not obtain employment through the services of JWCA. In fact, only a small number of JWCA's clients obtained employment through the services of JWCA.

(3) The fees paid by most of JWCA's clients were not refunded. In fact, only a small number of clients received refunds from JWCA.

(4) JWCA did not limit their clients to those persons they could

successfully place. Instead, JWCA accepted almost any client that could pay its fees.

Therefore, the representations set forth in Paragraph Four were false and misleading.

PAR. 6. In the further course and conduct of respondent's business, respondent represented, directly or by implication, to prospective clients that JWCA had placed in jobs a large percentage, such as, *inter alia,* 80%, 85% or 90%, of its clients.

PAR. 7. In truth and in fact, JWCA did not place in jobs a large percentage, such as, *inter alia,* 80%, 85% or 90% of its clients. Therefore, the representation set forth in Paragraph Six was false and misleading.

PAR. 8. Through the use of the representation referred to in Paragraph Six, and other representations not specifically set forth herein, respondent represented, directly or by implication, that he possessed and relied upon a reasonable basis for the representation set forth in Paragraph Six at the time of the initial representation and each subsequent representation.

PAR. 9. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making the representation set forth in Paragraph Six. Therefore, the representation set forth in Paragraph Eight was false and deceptive.

PAR. 10. In the course and conduct of its business, and at all times mentioned herein, respondent has been in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as services sold by respondent.

PAR. 11. The use by respondent of the aforesaid false and misleading representations, had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said representations were true and complete, and into purchase of respondent's services by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of JWCA's competitors and constituted and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission, would charge respondent with violation of the Federal Trade Commission Act.

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Roy B. Kelly, individually and as a former officer of John William Costello Associates, Inc., a corporation organized, existing and formerly doing business under and by virtue of the laws of the District of Columbia, with its office and place of business previously at 1612 K Street, N. W., in the City of Washington, District of Columbia. The present address of Roy B. Kelly is 4701 Woodward Avenue, #331, Chevy Chase, Maryland.

Respondent Roy B. Kelly was an officer of said corporation. He formulated, directed, and controlled the policies, acts and practices of said corporation, and its principal office and place of business was previously located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Roy B. Kelly, individually and as a former officer of John William Costello Associates, Inc., directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of any employ-

ment counseling services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication,

1. the basis upon which clients are accepted;

2. the number of interviews or job offers which clients typically receive as a result of respondent's services;

3. the number or percentage of clients who obtained interviews or job offers as a result of respondent's services;

4. the number or percentage of clients who obtained jobs as a result of respondent's services; and

5. the likelihood that clients' fees will be refunded.

B. Making any representation, directly or by implication, concerning the benefits received by former clients, or the benefits a client is likely to receive, including but not limited to, job interviews, job offers, jobs, or the return of clients' fees, unless at the time of making such representation respondent possesses and relies upon evidence constituting a reasonable basis for such representation.

C. 1. Failing whenever respondent makes any job placement representation, including representations concerning matters covered by subparagraphs 1–5 of Paragraph A., to:

(a) maintain accurate records for every client who has contracted for such employment services, noting who has been placed in a new job as a result of respondent's services; (b) compile a composite of such records, including at a minimum, the placement history for the eight calendar quarters immediately preceding the quarter in which the claim is made and a calculation on a quarterly and annual basis of the actual percentage of placements as a ratio of all clients who were placed to all clients who contracted for services but who did not cancel within any applicable cooling-off period; and (c) advise each prospective client orally and in writing, that a composite of placement records is available on request.

2. Failing to include in every contract for such job placement services and in any advertisement or promotional material that contains any express or implied job placement claim, a clear and conspicuous statement that a composite of placement records for the previous two (2) years is available for inspection and copying upon request.

D. Accepting any fee from a client or obligating a client to pay any fee before that client has obtained employment through the efforts of respondent; provided, however, that this prohibition shall not apply if respondent:

1. provides only counseling or resume writing services;

2. does not make any representations, express or implied, concerning (a) respondent's job placement rates with former clients; or (b) respondent's ability to locate prospective employers or his ability to obtain interviews for clients or place clients in jobs; and

3. discloses to the client orally and clearly and conspicuously in a written contract, that (a) respondent's services only include employment counseling and/or resume writing; and (b) respondent has not contracted to obtain interviews for the client or to place him or her in a job.

E. Failing to maintain for three years from the date that the representations are last made or disseminated all materials relied upon by respondent in making any representation covered by this order and upon request make them available to the FTC for inspection and copying such materials.

II.

It is further ordered, That respondent distribute a copy of this order to all present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that respondent secure from each such person a signed statement acknowledging receipt of said order.

III.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, respondent shall promptly notify the Commission of each affiliation of a new business or employment. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph will not affect any other obligation arising under this order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

JOHN WILLIAM COSTELLO ASSOCIATES, INC., ET AL

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3178. Complaint, Feb. 4, 1986—Decision, Feb. 4, 1986

This consent order requires two Washington, D.C.-based employment counseling services and four corporate officers, among other things, to cease misrepresenting: (1) the basis on which clients are accepted; (2) the number of clients who have obtained interviews, job offers, or jobs through respondents' services; and (3) the chances that the clients' fees would be refunded because the employer would likely pay the respondents a finder's fee. Additionally, respondents are required to have a reasonable basis for any placement claims they make, and whenever such placement claims are made, to maintain records of their placements and make a composite of these records available to clients on request. Further, respondents are prohibited from accepting a fee until a client has obtained employment through respondents' services.

Appearances

For the Commission: *Walter C. Gross* and *E. Charles Lane.*

For the respondent: *Douglas L. Lashley, Beckett, Cromwell & Meyers,* Bethesda, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that John William Costello Associates, Inc., a corporation, National Executive Search, Inc., a corporation, John William Costello, Sr., individually and as an officer of said corporations, John William Costello, Jr., individually and as an officer of said corporations, James H. Sellors, individually and as an officer of said corporations, and William S. Spector, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents John William Costello Associates, Inc. (JWCA) and National Executive Search, Inc. (NESI) are corporations organized, existing and formerly doing business under and by virtue

of the laws of the District of Columbia. All of the above corporate respondents had their principal offices and places of business at 1612 K Street, N.W., Washington, D.C..

Respondents John William Costello, Sr., John William Costello, Jr., James H. Sellors, and William S. Spector are or were officers of both of the corporate respondents named herein. They directed, formulated and controlled the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth.

John William Costello, Sr.'s address is 5601 River Road, Bethesda, Maryland.

John William Costello, Jr.'s address is 7866 Archbold Terrace, Cabin John, Maryland.

James H. Sellors' address is 12900 Old Frederick Road, Sykesville, Maryland.

William S. Spector's address is 41 Orchard Way South, Rockville, Maryland.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents, until at least August 1, 1983, engaged in the advertising, offering for sale, and sale of services to persons seeking employment. These services included, *inter alia,* providing advice, assistance and counseling to clients, preparing resumes for clients, preparing cover letters to prospective employers, identifying companies as prospective employers, and mailing resumes and cover letters to prospective employers. The cost of respondents' services ranged from $2,500 to $25,000 and higher.

PAR. 3. Respondents advertised their services in newspapers of interstate circulation, in Washington, D.C., and in various states. Respondents solicited prospective clients for their services at regional sales offices located in various states and offered and sold their services at their principal office and place of business in Washington, D.C. Respondents maintained a substantial course of business, including the acts and practices as hereinafter set forth, which were in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, for the purpose of inducing prospective clients to purchase their services, respondents, through various statements in newspaper advertisements and promotional materials and orally by their officers and sales representatives, represented, directly or by implication, that:

(1) Respondents' clients typically received several interviews with and job offers from prospective employers through the services of respondents.

(2) The large majority of respondents' previous clients obtained employment through the services of respondents.

(3) Most of respondents' clients received a refund, in whole or in part, of fees paid to respondents.

(4) Respondents carefully screened prospective applicants and only accepted as clients those persons that they could successfully place.

PAR. 5. In truth and in fact:

(1) Respondents' clients seldom received any interviews or job offers through respondents' services.

(2) The large majority of respondents' previous clients did not obtain employment through the services of respondents. In fact, only a small number of respondents' clients obtained employment through the services of respondents.

(3) The fees paid by most of respondents' clients were not refunded. In fact, only a small number of clients received refunds from respondents.

(4) Respondents did not limit their clients to those persons they could successfully place. Instead, respondents accepted almost any client that could pay respondents' fees.

Therefore, the representations set forth in Paragraph Four were false and misleading.

PAR. 6. In the further course and conduct of their business, respondents have represented, directly or by implication, to prospective clients that they had placed in jobs a large percentage, such as, *inter alia,* 80%, 85% or 90%, of their clients.

PAR. 7. In truth and in fact, respondents have not placed in jobs a large percentage, such as, *inter alia,* 80%, 85% or 90% of their clients. Therefore, the representation set forth in Paragraph Six was false and misleading.

PAR. 8. Through the use of the representation referred to in Paragraph Six, and other representations not specifically set forth herein, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for the representation set forth in Paragraph Six at the time of the initial representation and each subsequent representation.

PAR. 9. In truth and in fact, respondents did not possess and rely upon a reasonable basis for making the representation set forth in Paragraph Six. Therefore, the representation set forth in Paragraph Eight was false and deceptive.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in or affecting commerce with corporations, firms and individuals

engaged in the sale of services of the same general kind and nature as services sold by respondents.

PAR. 11. The use by respondents of the aforesaid false and misleading representations, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said representations were, and are, true and complete, and into purchase of respondents' services by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission, would charge respondents with violation of the Federal Trade Commission Act.

The respondents, Douglas L. Lashley, Attorney for James H. Sellors, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents John William Costello Associates, Inc. (JWCA) and National Executive Search, Inc. (NESI) are corporations organized, existing and formerly doing business under and by virtue of the laws

of the District of Columbia, with their offices and places of business previously at 1612 K Street, N. W., in the City of Washington, District of Columbia.

Respondents John William Costello, Sr., John William Costello, Jr., James H. Sellors, and William S. Spector are or were officers of said corporations. They formulated, directed, and controlled the policies, acts and practices of said corporations, and their principal offices and places of business were previously located at the above stated address.

John William Costello, Sr.'s address is 5601 River Road, Bethesda, Maryland.

John William Costello, Jr.'s address is 7866 Archbold Terrace, Cabin John, Maryland.

James H. Sellors' address is 12900 Old Frederick Road, Sykesville, Maryland.

William S. Spector's address is 41 Orchard Way South, Rockville, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents John William Costello Associates, Inc., a corporation, and National Executive Search, Inc., a corporation, their successors and assigns, and their officers, and respondents John William Costello, Sr., John William Costello, Jr., James H. Sellors, and William S. Spector, individually and as officers of said corporations, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of any employment counseling service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication,

1. the basis upon which clients are accepted;

2. the number of interviews or job offers which clients typically receive as a result of respodents' services;

3. the number or percentage of clients who obtained interviews or job offers as a result of respondents' services;

4. the number or percentage of clients who obtained jobs as a result of respondents' services; and

5. the likelihood that clients' fees will be refunded.

B. Making any representation, directly or by implication, concerning the benefits received by former clients, or the benefits a client is likely to receive, including but not limited to, job interviews, job offers, jobs, or the return of clients' fees, unless at the time of making such representation respondents possess and rely upon evidence constituting a reasonable basis for such representation.

C. 1. Failing whenever respondents make any job placement representation, including representations concerning matters covered by subparagraphs 1–5 of Paragraph A., to:

(a) maintain accurate records for every client who has contracted for such employment services, noting who has been placed in a new job as a result of respondents' services; (b) compile a composite of such records, including at a minimum, the placement history for the eight calendar quarters immediately preceding the quarter in which the claim is made and a calculation on a quarterly and annual basis of the actual percentage of placements as a ratio of all clients who were placed to all clients who contracted for services but who did not cancel within any applicable cooling-off period; and (c) advise each prospective client orally and in writing, that a composite of placement records is available on request.

2. Failing to include in every contract for such job placement services and in any advertisement or promotional material that contains any express or implied job placement claim, a clear and conspicuous statement that a composite of placement records for the previous two (2) years is available for inspection and copying upon request.

D. Accepting any fee from a client or obligating a client to pay any fee before that client has obtained employment through the efforts of respondents; provided, however, that this prohibition shall not apply if respondents:

1. provide only counseling or resume writing services;

2. do not make any representations, express or implied, concerning (a) respondents' job placement rates with former clients; or (b) respondents' ability to locate prospective employers or their ability to obtain interviews for clients or place clients in jobs; and

3. disclose to the client orally and clearly and conspicuously in a written contract, that (a) respondents' services only include employment counseling and/or resume writing; and (b) respondents have not contracted to obtain interviews for the client or to place him or her in a job.

E. Failing to maintain for three years from the date that the representations are last made or disseminated all materials relied upon by respondents in making any representation covered by this order and

upon request make them available to the FTC for inspection and copying such materials.

II.

It is further ordered, That respondents distribute a copy of this order to all operating divisions of said corporations and to present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

III.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliations with new businesses or employment. In addition, for a period of five (5) years from the date of service of this order, each respondent shall promptly notify the Commission of each affiliation of a new business or employment. Each such notice shall include each respondents' new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondents' duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph will not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NATIONAL ENERGY ASSOCIATES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3179. Complaint, Feb. 5, 1986—Decision, Feb. 5, 1986

This consent order requires a Norcross, Ga. manufacturer and marketer of home energy controlling devices, and its corporate officer, among other things, to cease making claims of energy savings associated with the product "Cyclematic", or any other energy-control device, without competent and reliable substantiation. Additionally, respondents are prohibited from representing that consumers are eligible for a federal income tax credit with the purchase of their products, unless that is true.

Appearances

For the Commission: *Michael Dershowitz* and *Sandra N. Hammer.*

For the respondents: *J. Patrick O'Brien, Boyce, Thompson & O'Brien,* Norcross, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that National Energy Associates, Inc., a corporation, and James B. Brooks, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) National Energy Associates, Inc. is a Georgia corporation with its principal office or place of business at 6435 Warren Drive, Norcross, Georgia.

(b) James B. Brooks is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, sell and distribute energy control devices for residential or small commercial use.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In advertisements, respondents have made various statements about the energy savings capability of their energy control devices sold under the brand name "Cyclematic." Typical and illustrative of these statements, but not all-inclusive thereof, are the following, some of which appear in the advertisements attached hereto as Exhibits A and B:

15% to 20% Guaranteed savings . . .

Cyclematic has been proven to save up to 30% on annual heating and/or cooling costs.

Typically, a Cyclematic will pay for itself in one to two years or less with the money saved.

Qualifies for 15% Federal Energy Tax Credit.

PAR. 5. Through the use of the above statements, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(1) Use of the Cyclematic energy control device will save consumers at least 15% and possibly, as much as 30% on their annual small commercial or home heating and cooling bills.

(2) It will take two years or less for consumers to save enough money on their small commercial or home heating and cooling bills by using the Cyclematic energy control device to recoup the retail cost of the Cyclematic energy control device.

(3) Competent and reliable tests or studies prove that consumers will save at least 15% and possibly, as much as 30% on their annual small commercial or home heating and cooling bills by using the Cyclematic energy control device.

(4) Cyclematic is a qualified energy conservation product according to the U.S. Tax Code, thereby permitting purchasers of the product to obtain a tax credit and reduce their federal income tax liability.

PAR. 6. In truth and in fact:

(1) Consumers will not save 15%, or close to 15%, on their annual small commercial or home heating and cooling bills as a result of using the Cyclematic energy control device.

(2) Few, if any, consumers will save enough money on their small commercial or home heating and cooling bills by using the Cyclematic energy control device to recoup the retail cost of the Cyclematic device within two years, or close to two years.

(3) Energy savings of 15% to 30% on consumers' annual small

commercial or home heating and cooling bills due to the use of the Cyclematic energy control device have not been proven by competent and reliable tests or studies.

(4) Cyclematic is not a qualified energy conservation product according to the U.S. Tax Code. Therefore, purchasers of Cyclematic cannot obtain a tax credit or reduce their federal income tax liability by purchasing the product.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in Paragraph Five, they possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making those representations because, *inter alia*, respondents' test protocols and calculations were not designed or conducted in a manner to produce competent, reliable and statistically meaningful results. Therefore, respondents' representations, as set forth in Paragraph Seven, were, and are, false and misleading.

PAR. 9. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT A

WITH NEA'S CYCLEMATIC™ YOU HAVE:

- Ease of operation and reliability (can last up to 25 years!)
- No comfort loss (improves air circulation)
- A 15% Federal Tax Credit (plus applicable state energy credit)
- Few adjustments needed — exclusive environmental sensor with computers system for you!
- A 15% to 20% Guaranteed savings or your money back!
- Insured savings based on consumption (Monthly savings rapidly pays for it
- Computer-like intelligence which adjusts system to maintain comfort level
- A hand in helping America conserve her energy resources

TOO HIGH UTILITY BILLS!

The Energy Crisis in America Today

America has developed a life style that requires enormous amounts of energy. Now as America enters an era of scarce and costly energy supplies we must adjust our lifestyles to reduce energy consumption.

Doing Your Part in Saving America's Energy Will Save You Money!

Today Americans face the most serious domestic challenge they are likely to face in their lifetimes—the energy challenge. This challenge is that the domestic demand for energy keeps rising faster than the domestic supply. * This challenge should become your personal crusade to help Americans reduce energy demand at home and work.

Much of America's energy is used inefficiently. By saving energy we can protect jobs, the environment and the basic American standard of living, not only for ourselves but also for our children and grandchildren. All of us will pay a heavy price if we do not save energy!

You're the one who decides how much energy you'll save. By how much you conserve. It DOES depend on how serious you are.

OUR ENERGY SOLUTION

The NEA Way to Save Your Dollar's and America's Energy

As an important part of the energy solution for America, National Energy Associates, Inc. is proud to present the Cyclematic™. The Cyclematic™ is a micro-electronic thermostat energy monitor for central heating and air conditioning systems.

The engineering staff at TimeMark Corp. has many years of experience in the application and manufacture of energy control systems for commercial buildings. NEA and TimeMark Corp. have developed a most cost effective thermostat energy monitor. This system is especially designed for homes and small businesses. It applies the same degree of high technology which provides large commercial businesses millions of dollars in energy cost savings annually.

This is The System That Saves You Money

The Cyclematic™'s principal of operation is duty cycling. This improves the efficiency of your heating and cooling system, plus increases the efficiency of your thermostat. The Cyclematic™ reduces your costs by reducing the operating time of your air conditioning compressor and heating system. Even though the run times are reduced uniform comfort is maintained throughout your home or business.

IT'S YOUR MONEY

It Pays for Itself in Savings!

With a Cyclematic™ Energy Control System you can start saving on your energy costs today! Sooner or later you'll spend the money for a Cyclematic™ either in increased energy costs or on a Cyclematic™. The initial investment you're willing to make means more money you'll save in the long run.

* "Tips for Energy Savers" U.S. Department of Energy
page 1 DOE/OPA 0037 9/78

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EXHIBIT B

THE SYSTEM YOU CAN'T BEAT.

NO PROGRAMMING NEEDED

The Cyclematic™ requires no programming. Once installed on your system the factory programs automatically start saving energy. The cycle selector switch is the only adjustment that is ever needed. The three settings High-Med-Low insure that the Cyclematic™ is the right energy management system for both residential and commercial applications. Once set to the equipment, Cyclematic™ through its temperature sensing capabilities adjust the heating and cooling system to maintain a comfort level while continuing to reduce energy consumption.

ENVIRONMENTAL TEMPERATURE SENSOR

Cyclematic™ incorporates an environmental temperature sensor to maintain the best comfort level at the same time insuring the system is operating at peak efficiency. The thermistor sensor monitors the air space temperature and will automatically adjust the system operation for maximum comfort and savings.

OPERATIONAL PERFORMANCE INDICATORS

Cyclematic™ incorporates 6 O.P.I. LEDs that allows the owner to visually monitor the system's operational performance, and indicates when a change in the cycle selector switch may be required. An illuminated comfort sensor that never shuts off indicates that the cycle selector switch needs to be adjusted to the next lower setting, to achieve the greatest savings while insuring comfort. The other indicators indicate the operation of the system and the Cyclematic™.

PROVEN MONEY SAVINGS

Cyclematic™ has been proven to save up to 30% on annual heating and/or cooling costs. With such savings Cyclematic™ can yield an immediate return on investment. What's more, it qualifies for a 15% Federal Energy Tax credit!

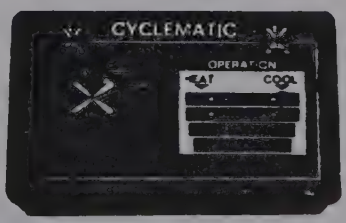
UNBEATABLE FEATURES

- Micro-electronic control
- Ease of installation
- Ease of operation
- Solid state reliability
- Automatic Heat. Cool changeover
- Eliminates stratification through increased air circulation
- Proven money savings
- Low voltage operation
- Commercial and Residential applications
- Increased comfort

BENEFITS

- Insured energy savings by Triple A Insurance Company
- Qualifies for 15% Federal Energy Tax Credit
- A 5 year limited warranty
- Monthly savings rapidly returns investment

The choice that faces you now - continue paying the power company or save with the Cyclematic™ today.



Cyclematic ™

national ENERGY.

3150 Gateway Drive
Norcross, G A 30071

L-011 3/84

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Energy Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at 6435 Warren Drive, Norcross, Georgia.

Respondent James B. Brooks is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

Definitions

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to energy savings, energy cost savings, efficiency or conservation, "payback," or "payback" potential.

A *competent and reliable test* means any scientific, engineering, laboratory, or other analytical report, study or survey prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation and analytical procedures that ensure accurate, reliable and statistically meaningful results.

Small commercial heating and cooling systems are similar to residential, central forced air type systems.

Energy control device (sometimes referred to as *duty-cycler* or *cyclic controller*) means any electronic device which is not a setback thermostat, but which:

(a) functions to interrupt a thermostatically-controlled cycle of any single, residential or small commercial, forced air central heating or air conditioning unit; or which

(b) may be incorporated in any other product, such as a setback thermostat, to function in the manner described in (a) above.

PART I

It is ordered, That respondents National Energy Associates, Inc., a corporation, its successors and assigns, and its officers, and James B. Brooks, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any energy control device or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, in any manner that:

(1) Consumers will save 15%, or close to 15%, on their annual small commercial or home heating and cooling bills as a result of using Cyclematic, or any other such energy control device, as defined herein.

(2) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using Cyclematic to recoup the approximately $500 retail cost of Cyclematic within two years, or close to two years.

(3) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using

any energy control device, as defined herein, costing approximately $500 to recoup such cost within two years, or close to two years.

(4) Competent and reliable tests or studies prove that energy savings of 15%, or close to 15% savings, on consumers' annual small commercial or home heating and cooling bills are achievable due to the use of Cyclematic, or any other such energy control device, as defined herein.

(5) Consumers can obtain a federal tax credit or reduce their federal income tax liability, by purchasing Cyclematic or any other such energy control device, as defined herein, unless such is the case.

B. Making any energy-related claim for any energy control device, or any other product or service, unless at the time that the claim is made, respondents possess and rely upon a competent and reliable test or other objective material which substantiates the claim.

C. Misrepresenting, directly or by implication, in any manner, the purpose, content, or conclusion of any test, study, or survey upon which respondents rely as substantiation for any energy-related claim, or making any representation which is inconsistent with the results or conclusions of any such test, study or survey.

PART II

It is further ordered, That respondents National Energy Associates, Inc., a corporation, its successors and assigns, and its officers, and James B. Brooks, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any energy control device or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, for at least three years from the date of the last dissemination of energy-related claims, maintain and upon request make available to Federal Trade Commission staff for inspection and copying, copies of:

1. All materials relied upon to substantiate any energy-related claim; and
2. all test reports, studies, surveys or demonstrations in their possession that contradict, qualify, or call into question any energy-related claim.

PART III

It is further ordered, That respondents shall distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives or employees engaged in the preparation or

placement of advertisements or other sales materials, and to each of their distributors or dealers engaged in the wholesale or retail sale of any energy control device manufactured, offered for sale, sold, or distributed by or for respondents.

PART IV

It is further ordered, that respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That each individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of three years from the date of service of this order, each individual respondent named herein shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices and of his affiliation with any new business or employment in which his own duties and responsibilities involve the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

PART VI

It is further ordered, that respondents shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order.

IN THE MATTER OF

MIDCON CORP., ET AL

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9198. Complaint, Sept. 19, 1985—Decision, Feb. 6, 1986

This consent order requires, among other things, a Lombard, Ill. natural gas pipeline owner and operator to divest its interest in the Louisiana portion of the Acadian Gas Pipeline System, which serves markets in Louisiana and Texas. The Acadian system is currently owned jointly by MidCon Corp. and Texas Oil and Gas Co. MidCon is also required to obtain Commission approval before acquiring certain gas pipeline operations in the New Orleans/Baton Rouge market. This consent order resolves part of a two-count administrative complaint issued by the FTC that challenges MidCon Corp.'s proposed merger with United Energy Resources, Inc.

Appearances

For the Commission: *Marc G. Schildkraut* and *David C. Dickey.*

For the respondents: *Paul E. Goldstein,* in-house counsel, Lombard, Ill. for respondent MidCon Corp. and *Theodore F. Weiss, Jr., Baker & Botts,* Houston, Tex. and *Kenneth L. Wiseman* and *Jay L. Gallia,* Houston, Tex., for respondent United Energy Resources, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent MidCon Corp., a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent United Energy Resources, Inc., in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. *MidCon* means MidCon Corp., subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees,

agents and representatives; and each partnership, joint venture, joint stock company or concession in which MidCon is a participant.

b. *United* means United Energy Resources, Inc., its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which United is a participant.

c. *The acquisition* means the transaction described, in whole or in part, in Paragraph 14 of this complaint.

d. *Transportation* means transportation of natural gas for one's own account as well as for others.

II. RESPONDENTS

A. MidCon

2. Respondent MidCon is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 701 East 22nd Street, Lombard, Illinois.

3. Respondent MidCon owns businesses that operate at several levels in the natural gas transportation industry.

4. Respondent MidCon had 1984 sales of $4.2 billion in the fiscal year ending September 30, 1984 and assets of $3.5 billion as of September 30, 1984.

5. As of September 30, 1984, respondent MidCon owned and operated natural gas pipeline systems in the United States consisting of over 15,000 miles of pipeline. Midcon also owned and operated various other natural gas gathering and transmission facilities. Most of MidCon's system is interstate pipeline.

6. Respondent MidCon wholly or partially owns (or owns interests in companies that wholly or partially own) the following natural gas pipelines in the United States: Acadian Gas Pipeline System; Bayou Interstate Pipeline System; Calcasieu Gas Gathering System; Canyon Creek Compression Company; High Island Offshore System; Louisiana Industrial Gas Supply System; MidCon Texas Pipeline Corporation; Midven Pipeline Company; Mississippi River Transmission Corporation; MV Pipeline Company; Natural Gas Pipeline Company of America; Neches Pipeline System; Overthrust Pipeline Company; Pelican Interstate Gas System; Pelican Transmission System; Pontchartrain Natural Gas System; Spindletop Gas Distribution System; Stingray Pipeline Company; Trailblazer Pipeline Company; and U-T Offshore System.

7. At all times relevant herein, respondent MidCon has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose

business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. *United*

8. Respondent United is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 600 Travis Street, Houston, Texas.

9. Respondent United engages in the transmission and sale of natural gas, and in the exploration for and production of oil and gas.

10. Respondent United had 1984 sales of $4.0 billion and assets of $2.5 billion as of December 31, 1984.

11. As of December 31, 1984, respondent United owned and operated a natural gas pipeline system in the United States consisting of approximately 14,000 miles of pipeline.

12. Respondent United wholly or partially owns (or owns interests in companies that wholly or partially own) the following pipelines: United Gas Pipeline Company; United Texas Transmission Company; High Island Offshore System; Sea Robin Pipeline Company; U-T Offshore System; Mobile Bay Pipeline Company (Proposed); Northern Border Pipeline Company; Alaskan Northwest Natural Gas Transportation Company (Proposed); Trans-Anadarko Pipeline System (Proposed); Palo Duro Pipeline Company; Ione Gas Processing Company; Lake Murray Joint Venture; and Brookens Field Gathering System.

13. At all times relevant herein, respondent United has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

14. On or about August 13, 1985, MidCon commenced a cash tender offer for up to 18,100,000 shares of the outstanding shares of United common stock at a price of $41 per share with the intent of effecting a merger of MidCon Holding Corp., a Delaware corporation wholly-owned by MidCon, into United, pursuant to which United would become a wholly-owned subsidiary of MidCon, all as contemplated in that certain Agreement and Plan of Reorganization entered into among MidCon, its subsidiary, and United on August 11, 1985. United's Board of Directors has approved the tender offer and recommended its acceptance by United shareholders. If the acquisition is consummated as presently contemplated, the total value of the trans-

action will be about $1.1 billion. If consummated, it would result in the third largest natural gas transportation company in the United States.

IV. EFFECTS

Count One

15. The Commission repeats and realleges the allegations of Paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

16. One relevant line of commerce is the transportation of natural gas from producing fields and basins.

17. One relevant section of the country is the portion of the Gulf of Mexico off the coast of the states of Louisiana and Texas that contains the areas known as the High Island East Addition South Extension Area, the West Cameron South Addition Area and the East Cameron South Addition Area, and any submarket thereof.

18. Another relevant section of the country is the portion of the Gulf of Mexico off the coast of the State of Louisiana that contains the areas known as the West Cameron Area and the West Cameron West Addition Area, and any submarket thereof.

19. Another relevant section of the country is the portion of the Gulf of Mexico off the coast of the state of Louisiana that contains the areas known as the Vermilion Area, the Vermilion South Addition Area and the East Cameron Area, and any submarket thereof.

20. Another relevant section of the country is the portion of the Gulf of Mexico off the coasts of the states of Louisiana and Texas that contains the areas known as the High Island East Addition South Extension Area, the West Cameron South Addition Area, the East Cameron South Addition Area, the Garden Banks Area and the East Breaks Area, and any submarket thereof.

21. Consumption of natural gas in each of these sections of the country is substantially below production, with the result that most production in each of these sections of the country is transported by pipelines to consuming areas along the Gulf Coast and elsewhere in the United States.

22. The business of transporting by pipeline natural gas out of each of these respective sections of the country is concentrated.

23. It is difficult to enter into the business of transporting natural gas by pipeline in each of these respective sections of the country.

24. Respondents MidCon and United are each owners of 20 percent interests in the High Island Offshore System, which owns and operates a pipeline that runs from the High Island South Addition Area

and the High Island East Addition South Extension Area to the West Cameron Area.

25. Respondents MidCon and United are each owners of one-third interests in U-T Offshore System, which owns and operates a pipeline located in the Gulf of Mexico that runs from the West Cameron Area to the onshore area of Cameron Parish, Louisiana.

26. Respondent MidCon is owner of a 50 percent interest in the Stingray Pipeline Company, which owns and operates a pipeline located in the Gulf of Mexico that runs from the areas known as the High Island East Addition South Extension Area, West Cameron South Addition Area and East Cameron South Addition Area to the onshore area of Cameron Parish, Louisiana.

27. Respondent United is an owner of a 50 percent interest of the Sea Robin Pipeline Company, which owns and operates a pipeline located in the Gulf of Mexico that runs from the areas known as the East Cameron South Addition Area to the onshore area of Vermilion Parish, Louisiana.

28. Respondents MidCon and United, through their ownership interests in the High Island Offshore System, the U-T Offshore System, the Stingray Pipeline Company and the Sea Robin Pipeline Company, and in other ways, are direct and substantial competitors in the business of transporting natural gas out of producing fields and basins in each of the relevant sections of the country set out in complaint Paragraphs 17 through 20.

29. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields and basins in the relevant sections of the country set out in complaint Paragraphs 17 through 20, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways among others:

a. the acquisition will eliminate actual and potential competition between respondents MidCon and United;

b. The acquisition will eliminate actual and potential competition among competitors generally; and

c. the acquisition will increase concentration in the transportation of natural gas out of producing fields and basins in the relevant sections of the country set out in complaint Paragraphs 17 through 20, therefore increasing the likelihood of collusion.

Count Two

30. The Commission repeats and realleges the allegations of Para-

graphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

31. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation by pipeline and sale of natural gas in consuming areas.

32. One relevant section of the country is the part of the state of Louisiana that lies between Baton Rouge and New Orleans ("the Baton Rouge-New Orleans Corridor").

33. The business of transporting by pipeline and selling natural gas into and in the Baton Rouge-New Orleans Corridor is concentrated.

34. It is difficult to enter into the business of transporting by pipeline and selling natural gas in the Baton Rouge-New Orleans Corridor.

35. Respondent United is the second largest competitor in the business of transporting by pipeline and selling natural gas in the Baton Rouge-New Orleans Corridor.

36. Respondent MidCon is a competitor of United through MidCon's 50 percent ownership in Acadian Gas Pipeline System, Louisiana Industrial Gas Supply System, Pontchartrain Natural Gas System, Bayou Interstate Pipeline System, and Calcasieu Gas Gathering System ("the Acadian partnerships"), the most important of these partnerships being the Acadian Gas Pipeline System.

37. All material business decisions of the Acadian Gas Pipeline System and other Acadian partnerships require approval of respondent MidCon.

38. Respondent MidCon has access to all the proprietary data and business secrets of Acadian Gas Pipeline System and other Acadian partnerships.

39. Respondents MidCon and United are direct and substantial competitors in the business of transporting by pipeline and selling natural gas in the Baton Rouge-New Orleans Corridor.

40. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation and sale of natural gas in the Baton Rouge-New Orleans Corridor in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways among others:

a. the acquisition will eliminate actual competition between respondents MidCon and United;

b. the acquisition will eliminate acctual competition among competitors generally; and

c. the acquisition will increase concentration in the transportation

and sale of natural gas in the Baton Rouge-New Orleans Corridor, therefore increasing the likelihood of collusion.

V. VIOLATION CHARGED

41. The proposed acquisition of the stock and assets of United by MidCon, as set forth in Paragraph 14 herein, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The FTC having initiated an investigation of the proposed acquisition of shares of United Energy Resources, Inc. ("United") by MidCon Corp. ("MidCon"), and MidCon and United ("respondents") having been furnished with a copy of the complaint that the Commission has issued but withdrawn from adjudication as to Count Two of such complaint, which charges respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having executed an agreement containing a consent order as to Count Two of the complaint, and admission by respondents of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its rules and the recommendation of its staff, and having concluded that the consent agreement should be accepted;

Now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission makes the following jurisdictional findings and enters the following order:

1. MidCon is a corporation organized under the laws of Delaware with its executive office at 701 East 22nd Street, Lombard, Illinois.

United is a corporation organized under the laws of Delaware with its executive offices at 600 Travis Street, Houston, Texas.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I.

It is hereby ordered, that as used in this order the following definitions shall apply:

(a) *Acquisition* means MidCon's acquisition of shares of the Common Stock of United and the subsequent merger of an affiliate of MidCon into United pursuant to an Agreement and Plan of Reorganization.

(b) *Schedule A Properties* means the assets and businesses listed in Schedule A of this order.

(c) *MidCon* means MidCon Corp., its subsidiaries, divisions, groups and affiliates controlled by MidCon and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(d) *United* means United Energy Resources, Inc. as it was constituted prior to the acquisition, including its parents, subsidiaries, divisions, groups and affiliates controlled by United, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(e) The *New Orleans - Baton Rouge Corridor* means the area within 20 miles of any point along the Mississippi from the most upstream point where the river boarders on Baton Rouge, Louisiana to the most downstream point where the river borders on New Orleans, Louisiana.

(f) *Baton Rouge - New Orleans Corridor Pipeline* means a pipeline company other than MidCon that transported for sale by that company in the twelve months preceding the date of any proposed acquisition by MidCon a daily average of at least 90 million cubic feet of natural gas to the Baton Rouge - New Orleans Corridor for consumption therein. For the purposes of this definition, the deliveries of any entity acquired by a company during the preceding twelve months shall be deemed to be deliveries of the company for the entire preceding twelve-month period.

II.

It is further ordered, That:

(A) Within 12 months of the date this order becomes final, MidCon shall divest, absolutely and in good faith, the Schedule A Properties:

(B) Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in Count Two of the Commission's complaint.

III.

It is further ordered, That:

(A) If MidCon has not divested the Schedule A Properties within the 12-month period, MidCon shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring pursuant to section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission. In the event the court declines to appoint a trustee, MidCon shall consent to the appointment of a trustee by the Commission pursuant to this order. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by MidCon to comply with Paragraphs II(B) through VII of this order.

(B) If a trustee is appointed by a court or the Commission pursuant to Paragraph III(A) of this order, MidCon shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to MidCon's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any Schedule A Properties that have not been divested by MidCon within the time period for divestiture in Paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court. If, however, at the end of the 18-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of any business that the trustee has the duty to divest, and MidCon shall develop such financial or other information relevant to the assets to be divested as such a trustee may reasonably request. MidCon shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in Paragraph II(B). If bona fide offers are received by the trustee from more than one prospective purchaser, the Commission shall determine whether to approve each such purchaser, and the trustee shall divest to the purchaser elected by MidCon from among the purchasers approved by the Commission.

5. The trustee shall serve at the cost and expense of MidCon on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies and properties derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to MidCon and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, MidCon shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed for the balance of the 18-month period specified in Paragraph III(B)(2) or any extension thereof.

8. The trustee shall report in writing to MidCon and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

(C) MidCon shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. MidCon shall use its best efforts to ensure that the Schedule A Properties continue to be ongoing, viable enterprises engaged in the same business in which the Schedule A Properties are presently employed.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until MidCon has fully complied with the provisions of Paragraphs II and III of this order, MidCon shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with those provisions. MidCon shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of properties specified in Paragraph II of this order, including the identity of all parties contacted. MidCon also shall include in its compliance reports, copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

V.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date of this order becomes final, MidCon shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used by (and still suitable for use by), any interest in, or the whole or any substantial part of the stock or share capital of any Baton Rouge - New Orleans Corridor Pipeline; *provided, however,* that these prohibitions shall not relate to the construction of new facilities or participation in joint ventures in which MidCon or United is a participant on the date of service of this order.

One year from the date this order becomes final and annually thereafter MidCon shall file with the Commission a verified written report of its compliance with this paragraph.

VI.

It is further ordered, That for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to MidCon and United made to its principal office, MidCon and United shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the

control of MidCon and United relating to any matters contained in this order; and

B. Upon five days notice to MidCon or United and without restraint or interference from them, to interview officers or employees of MidCon or United who may have counsel present, regarding such matters.

VII.

It is further ordered, That MidCon shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor, corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

SCHEDULE A

1. One hundred percent (100%) of the stock owned by MidCon Corp. in MCN Acadian Gas Pipeline Corp., which in turn holds a partnership interest in Acadian Gas Pipeline System, a Texas general partnership.

2. One hundred percent (100%) of the stock owned by MidCon Corp. in MCN Louisiana Industrial Gas Supply Corp., which in turn holds a partnership interest in Louisiana Industrial Gas Supply System, a Texas general partnership.

3. One hundred percent (100%) of the stock owned by MidCon Corp. in MCN Pontchartrain Natural Gas Corp., which in turn holds a partnership interest in Pontchartrain Natural Gas System, a Texas general partnership.

4. One hundred percent (100%) of the stock owned by MidCon Corp. in MCN Bayou Interstate Pipeline Corp. which in turn holds a partnership interest in Bayou Interstate Pipeline System, a Texas general partnership.

5. One hundred percent (100%) of the stock owned by MidCon Corp. in MCN Calcasieu Gas Gathering Corp., which in turn holds a partnership interest in Calcasieu Gas Gathering System, a Texas general partnership.

IN THE MATTER OF

THE BENDIX CORPORATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-3042. Consent Order, Sept. 23, 1980—Set Aside Order, Feb. 6, 1986

The Federal Trade Commission has modified a 1980 consent order with The Bendix Corporation (96 F.T.C. 352) by setting aside portions of the order that required prior approval by the FTC before the respondent could acquire any interest in companies that manufacture or sell certain machine-tool products. The Commission ruled that the provision was no longer necessary since Bendix, and its parent company, Allied Corp., no longer manufacture or sell any kind of machine-tool product referred to in the order.

ORDER REOPENING AND SETTING ASIDE PORTIONS OF ORDER ISSUED SEPTEMBER 23, 1980

On October 16, 1985, Allied Corporation ("Allied") filed a Request pursuant to Section 5(b) of the Federal Trade Commission Act, 15, U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the consent order issued on September 23, 1980 ("the order") [96 F.T.C. 352] and terminate Paragraphs VIII and X thereof. Allied became subject to the order when it acquired The Bendix Corporation ("Bendix") on January 31, 1983.

Paragraph VIII, the only substantive provision of the order which still has prospective application, prohibits Bendix, for a ten year period, from acquiring without prior Commission approval, any company engaged in the manufacture or sale in the United States of rotating toolholders, external cylindrical grinding machines, or numerically controlled machine tools. Paragraph VIII exempts from this requirements any company engaged in the manufacture of numerically controlled machine tools whose assets devoted to such manufacture or whose sales thereof during the year preceding such acquisition were not in excess of $10 million. Paragraph X of the order requires respondent to report its compliance with Paragraph VII annually for a ten-year period.

After reviewing Allied's Request, the Commission has concluded that changed conditions of fact and the public interest warrant reopening the proceeding and setting aside Paragraphs VIII and X of the order. Allied has divested or sold off all of the product lines that gave rise to the order and the concerns that led to the order are no

longer applicable to Allied's current operations. The commission believes that under the circumstances presented here the costs, both the Allied and to the Commission, associated with continuing the moratorium provisions, are sufficient to outweigh the need for the order and the general presumption in favor of the repose and finality of Commission orders.

Accordingly, *it is ordered,* that this matter be, and it hereby is reopened and that Paragraphs VIII and X of the Commission's order issued on September 23, 1980, shall terminate as of the effective date of this order.

Commissioner Bailey was recused.

IN THE MATTER OF

NORTH AMERICAN PHILIPS CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3180 Complaint, Feb. 10, 1986—Decision, Feb. 10, 1986

This consent order requires a New York City marketer of Norelco Clean Air Machines, among other things, to cease misrepresenting the ability of air cleaners to eliminate or help eliminate indoor pollutants or the irritation they cause, the results of smoke chamber demonstrations or other tests, surveys or demonstrations of air cleaning appliances. Additionally, respondent is required to have competent and reliable substantiation for all future claims about its products' efficacy.

Appearances

For the Commission: *Brinley H. Williams, Judith P. Wilkenfeld, Donald G. D'Amato* and *Elizabeth T. Guarino.*

For the respondents: *Richard E. Dorl* and *William B. Gerwig,* in-house counsel, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North American Philips Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 E. 42nd Street, New York, New York.

PAR. 2. Respondent is now, and at all times relevant to this complaint has been, engaged in the manufacture and sale of portable, electric household air cleaning appliances, the Norelco Clean Air Machine, Models 0999, 1900, 1905, 1910, 1920, 1930 and 1940 (hereinafter referred to in the complaint as "air cleaning appliances"), and other products to the public.

PAR. 3. Respondent operates in various States of the United States

and in the District of Columbia. Respondent's manufacture, sale and distribution of air cleaning appliances mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent at all times mentioned herein has been and now is in competition with individuals, firms and corporations engaged in the sale of household air cleaning appliances and other products.

PAR. 5. In the course and conduct of its business, and for the purpose of promoting the sale and distribution of air cleaning appliances, respondent has disseminated and caused the dissemination of advertising for air cleaning appliances in national magazines, newspapers, and catalogs distributed by the mail and across state lines. Respondent has also placed air cleaning appliance advertisements with television stations having sufficient power to broadcast across state lines and into the District of Columbia. In addition, respondent has distributed by mail or other means, product brochures and other sales literature directly to consumers and to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 6. Typical of such advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the advertisements and promotional materials attached hereto as Exhibits A-E.

PAR. 7. Through the use of the statements and representations contained in the advertisements and promotional materials referred to in Paragraph Six, and others not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

a. The air cleaning appliances remove substantially all or clean substantially all tobacco smoke, dust, and pollen from the air people breathe under household living conditions.

b. The air cleaning appliances effectively help remove or effectively help clean tobacco smoke, dust and pollen from the air people breathe under household living conditions.

c. One air cleaning appliance "recirculates" all the air in a 14 foot $\times$ 18 foot room every 30–45 minutes.

d. Its smoke chamber demonstrations, depicted in the advertisements attached hereto as Exhibits A through C, among other advertisements, constitute proof or accurately or visually demonstrate that the air cleaning appliances will:

(1) remove substantially all or clean substantially all tobacco smoke, dust, pollen and other pollutants and impurities from the air people breathe under household living conditions;

(2) effectively help remove or effectively help clean tobacco smoke, dust, pollen and other pollutants and impurities from the air people breathe under household living conditions;

(3) eliminate substantially all or effectively help eliminate the irritation tobacco smoke, dust, and pollen can cause under household living conditions;

(4) provide a healthy home environment for consumers when used under household living conditions.

PAR. 8. In truth and in fact, the direct or implied representations set forth in Paragraph Seven are false, for reasons including but not limited to the following:

a. Respondent's tests and independent tests, when extrapolated by generally accepted procedures to household living conditions, show that the air cleaning appliances do not remove substantially all or clean substantially all tobacco smoke, dust and pollen from the air people breathe under household living conditions.

b. Respondent's tests and independent tests, when extrapolated by generally accepted procedures to household living conditions, show that the air cleaning appliances do not effectively help remove or effectively help clean tobacco smoke, dust and pollen from the air people breathe under household living conditions.

c. Respondent's tests and independent tests show that the air cleaning appliances cannot recirculate all the air in a 14 foot $\times$ 18 foot room every 30–45 minutes.

d. Respondent's tests and independent tests, when extrapolated by generally accepted procedures to household living conditions, show that respondent's smoke chamber demonstrations do not constitute proof or accurately or visually demonstrate that the air cleaning appliances will:

(1) remove substantially all or clean substantially all tobacco smoke, dust, pollen and other pollutants and impurities from the air people breathe under household living conditions;

(2) effectively help remove or effectively help clean tobacco smoke, dust, pollen and other pollutants and impurities from the air people breathe under household living conditions;

(3) eliminate substantially all or effectively help eliminate the irritation tobacco smoke, dust, and pollen can cause under household living conditions;

(4) provide a healthy home environment for consumers when used under household living conditions.

Therefore, the direct or implied representations set forth in Paragraph Seven were, and are, false and misleading.

PAR. 9. Through the use of the statements and representations contained in the advertisements and promotional materials referred to in Paragraph Six, and others not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

a. The air cleaning appliances remove substantially all, clean substantially all, effectively help remove or effectively help clean "other pollutants and impurities" from the air people breathe under household living conditions.

b. The air cleaning appliances eliminate substantially all or effectively help eliminate the irritation tobacco smoke, dust and pollen can cause under household living conditions.

c. The air cleaning appliances will provide a healthy home environment for consumers when used under household living conditions.

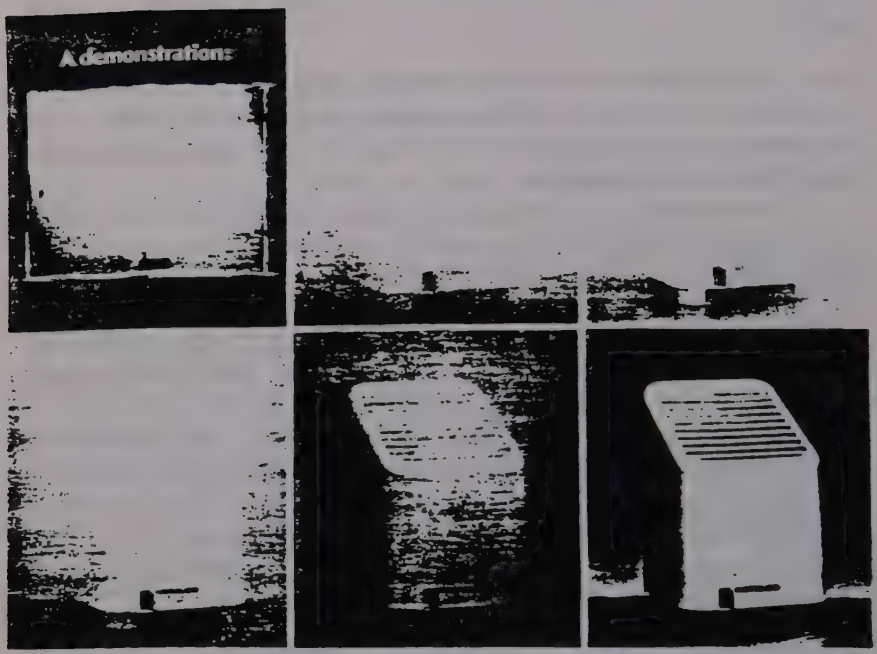
PAR. 10. Through the use of the statements and representations contained in the advertisements and promotional materials referred to in Paragraph Six, and other advertisements and promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraphs Seven and Nine at the initial dissemination of the representations and each subsequent dissemination.

PAR. 11. In truth and in fact, at such times referred to in Paragraph Ten, respondent did not possess and rely upon a reasonable basis for making the representations set forth in Paragraphs Seven and Nine because, *inter alia,* respondent either did not conduct appropriate tests or did not properly utilize generally accepted procedures to extrapolate test results to household living conditions. Therefore, respondent's representations set forth in Paragraphs Seven and Nine are false and misleading.

PAR. 12. The use by respondent of the aforesaid false and misleading representations, and the placement in the hands of others of the means and instrumentalities by and through which others may use the aforesaid false and misleading representations, have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said representations are true and complete and to induce such persons to purchase air cleaning appliances sold by respondent by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted and now constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A



Introducing the Clean Air Machine™. Fresh from Norelco.

There's probably something inside your home that you never even think of cleaning.

The air.

But with all the discomforting impurities and pollutants floating around in it, it's one thing you should clean quite often.

That's why Norelco is demonstrating how effectively its new Clean Air Machine™ works, in this smoke-filled container we prepared for our test.

As you can see, the Clean Air Machine™ actually cleans your air. By removing odors, dirt and other contaminants that are naturally found inside every room of your home. No matter how clean.

With its quiet, efficient motor, the Clean Air Machine™ draws in offending tobacco smoke, pet and cooking odors, dust, even pollen. Traps them in a specially formulated filter. And sends out clean, fresh, citrus-scented air.

Thus, eliminating the irritation and suffering that smoke-filled rooms can cause.

The compact Clean Air Machine™ is economical to use, too. Costing only pennies a week for continuous, 24-hour use. And each replaceable filter is designed to last approximately 3 months, with average use.

So provide a healthy home environment for your family and friends. With the new Norelco Clean Air Machine.™ After all, if it can clean the air in our demonstration, think how it'll clean the air in your home.

Easy-to-replace Clean Air Machine™ filter

Norelco® Clean Air Machine. Because your air gets dirty, too.

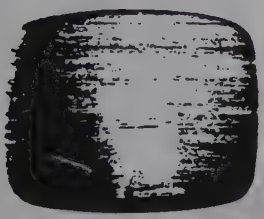
©1980 North American Philips Corporation, Consumer Products Divisions, High Ridge Park, Stamford, CT 06904

EXHIBIT B

NORELCO — CLEAN AIR MACHINE

"FRESH FROM NORELCO"

r 's probably something in your
hat never gets cleaned.



The air.

That's why Norelco is demonstrating its new Clean Air Machine in this smoke-filled container.

The Clean Air Machine actually removes impurities and pollutants.

Its quiet motor draws in tobacco smoke, pet and cooking odors, even dust.

traps them in a replaceable filter, and sends out fresh, clean, citrus-scented air.

Clean Air Machine. Fresh from Norelco.

Put one to the test in your home.

EXHIBIT C

adio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 599-5500

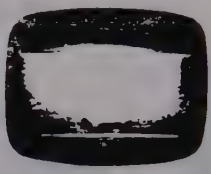
PRODUCT
PROGRAM

THE NOREL / CLEAN AIR MACHINES 83-01040
TODAY 1/20/83 30 SEC
WNBC-TV (NEW YORK) 7:41AM

REVISION OF COMMERCIAL 82-19368

(MUSIC) ANNCR. Watch The Noreico Clean Air Machine help fight dirty air with clean air.

2. inside this smoke filled container.



3. The Clean Air Machine with its new electricstatic multi-layer filter

4. works like a magnet, to help trap pollutants

such as tobacco smoke, pet and cooking odors, even dust and pollen.

6. The result, cleaner, fresher air.

7. So help fight your dirty air with clean air.

8. The Noreico Clean Air Machines. Fresh from Noreico.

For maximum effectiveness.

10. change your filter often. And be sure it's a universal filter from Noreico. (MUSIC OUT)

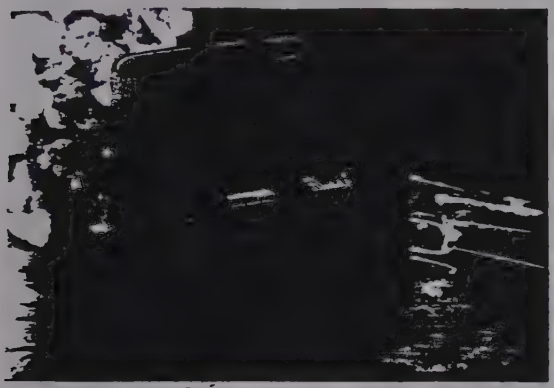
ALSO AVAILABLE IN COLOR VIDEO-TAPE CASSETTE

Radio TV Reports, Inc. endeavors to assure the accuracy of material supplied but cannot be responsible for mistakes or omissions.

EXHIBIT D

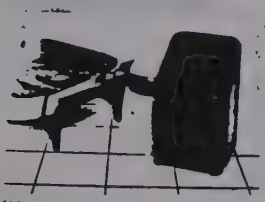
The Norelco Clean Air Machine...

Helps remove offensive tobacco smoke, cooking odors, pet odors, dust, even pollen from the air.

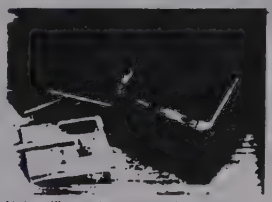


Norelco Clean Air Machine II HB1920
The deluxe dual speed air cleanser that filters the air even more efficiently and more effectively. Engineered and constructed with a lot of power the Clean Air Machine II is big enough to clear larger rooms but compact enough to sit on a desk or table. Simulated wood grain fits perfectly into any decor at the home or office. Energy efficient quiet motor and 3 position slide switch

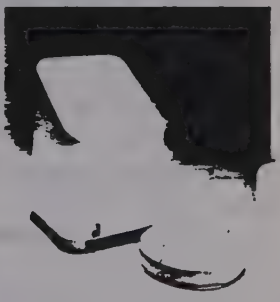
Norelco Clean Air Machine HB1905
Designed and constructed with Norelco quality. An economical to use electrical appliance that effectively helps remove tobacco smoke, odors, pollen, even dust from the air. Compact design and simulated wood grain make it the perfect air cleanser for every room in the home or office. Convenient on off switch.



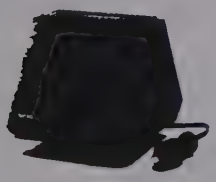
At home: It doesn't cover odors, it helps remove them.



At the office: Helps eliminate the irritation smoke filled rooms can cause.



Norelco Clean Air Machine HB1900
The air cleanser that clears the air. A compact energy efficient air filtration system that costs only pennies a day to recirculate fresher, cleaner air. A proven success story that generates high turnover and repeat customer purchase. The Clean Air Machine has a convenient on off swit



In a car: Plugs into a cigarette lighter to help remove smoke, odors, and dust from the air.

Norelco Clean Air Machine: Works to help filter tobacco smoke, dust, pollen, even pet odors from the air.

EXHIBIT E

Draws in polluted air...Cleaner air flows out.

Easy to replace filters work up to 3 months. Designed to fit Rush Hampton Ecologizer®. Special see-through design helps you judge when the filter needs to be changed. Convenient dating label on every filter serves as a reminder.

Quality Features

- **Removes tobacco smoke, odors, dust, pollen and odor causing bacteria and fungi from the air.**
- **High powered, energy efficient; quiet motor, only 16 watts.**
- **Filters air through absorbent, citrus scented particles.**
- **Recirculates the air of a 14'x18' room approximately every 30-45 minutes**
- **Convenient ON/OFF switch.**

Specifications: Model HB1900

Dimensions:	5"x7½"x5": approx.
Voltage:	120V AC 60Hz
Power:	16 Watts
Weight:	2 lbs.
Cord Length:	6 Ft.
Switch:	ON/OFF slide

Norelco®

North American Philips Corporation
Consumer Products Divisions
High Ridge Park
Stamford, Ct. 06904

This symbol on the product's nameplate means it is listed by Underwriters Laboratories, Inc.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent North American Philips Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 East 42nd Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

PART I

It is ordered, That respondent North American Philips Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Norelco Clean Air Machine Models 0999, 1900, 1905, 1910, 1920, 1930, or 1940, or other air clean-

ers with similar performance specifications, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, contrary to fact, by the use of the words "cleans," "clears," "removes," "eliminates," or any other words or phrases that the reasonable consumer would interpret as meaning "substantially all," that such appliances, under household living conditions, clean the air of substantially all or remove substantially all tobacco smoke, dust, or pollen from the air that people breathe.

B. Representing, directly or by implication, contrary to fact, by the use of the words "helps clean," "helps clear," "helps remove," "helps eliminate," or any other words or phrases that the reasonable consumer would interpret as meaning effective removal, that any such appliance, under household living conditions, effectively helps clean the air of, or effectively helps remove a substantial portion of tobacco smoke, dust, or pollen from the air that people breathe.

C. Representing, directly or by implication, contrary to fact, that any such appliance, under household living conditions, eliminates the irritation tobacco smoke, dust or pollen can cause.

D. Representing, directly or by implication, contrary to fact, that any smoke chamber demonstration constitutes proof or accurately or visually demonstrates an air cleaning appliance's capability to remove a substantial portion of tobacco smoke, dust or pollen from the air that people breathe under household living conditions.

PART II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Norelco Clean Air Machine Models 0999, 1900, 1905, 1910, 1920, 1930, or 1940, or other air cleaners with similar performance specifications, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean or remove indoor air contaminants, including but not limited to tobacco smoke, dust, and pollen.

B. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean or remove any quantity of indoor air contaminants, including but not limited to tobacco smoke, dust, and pollen.

C. Misrepresenting in any manner, directly or by implication, the conditions of use under which any such appliance or equipment will clean or remove indoor air contaminants.

D. Misrepresenting in any manner, directly or by implication, the ability of any such appliance or equipment to clean air or remove indoor air contaminants from enclosures or rooms of any specified size or within any specified period of time.

PART III

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Norelco Clean Air Machine Models 0999, 1900, 1905, 1910, 1920, 1930, or 1940, or any other consumer appliance which affects the quality of air, which for purposes of this Part shall mean any air cleaner, air freshener, air conditioner, dehumidifier and smokeless ashtray, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from advertising by or through the use of any test, survey, experiment, demonstration, study or report, or the results thereof, or any other information or evidence that appears or purports to confirm or prove any characteristic or the truth of any representation regarding any such consumer appliance which affects the quality of air, when such advertising does not accurately demonstrate, prove, support or confirm such characteristic or representation.

PART IV

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Norelco Clean Air Machine Models 0999, 1900, 1905, 1910, 1920, 1930, or 1940, or any other air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, any performance characteristic of any such appliance or equipment unless at the time of making the representation, respondent possesses and relies upon a reasonable basis for such representation. A reasonable basis shall consist of competent and reliable evidence which substantiates such representation. To the extent the evidence of a reasonable basis consists of scientific or professional tests, experiments, analyses, re-

search, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" for purposes of the above paragraph only if those tests, experiments, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

B. Representing, directly or by implication, that any air cleaning appliance or equipment will perform under any set of conditions, including household living conditions, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation(s) either by being related to those conditions or by having been extrapolated to those conditions by generally accepted procedures.

For purposes of this Part of the order, the term *performance characteristic* includes, but is not limited to:

a. the power, strength or capacity of the appliance or equipment whether expressed in terms of volume of air circulated or in terms of room sizes or otherwise;

b. the cleaning, filtration, or removal ability of the appliance or equipment whether expressed in terms of a specific contaminant, in terms of the filtering media or mechanism, or in terms of the appliance or equipment itself;

c. the speed of operation; or

d. the comparative power, strength, filtration or cleaning capacity, removal ability, or speed of operation.

PART V

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order;

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials or post purchase materials making such claim or representation were last disseminated. Such records shall be made available to the Commission staff for inspection upon reasonable notice.

PART VI

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation and placement of such advertisements or other such sales materials.

PART VII

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART VIII

It is further ordered, That respondent, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

BOISE CASCADE CORPORATION

FINAL ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket 9133. Complaint, April 23, 1980—Final Order, Feb. 11, 1986

This final order requires a Boise, Idaho distributor of office products to cease accepting from any supplier a net price for office products that is lower than the price at which the supplier sells the products to other retailers with whom respondent competes. The Commission ruled that respondent violated the Robinson-Patman Act by knowingly receiving wholesaler discounts on goods it sold at retail in competition with other dealers.

Appearances

For the Commission: *Arnold C. Celnicker, Chris M. Couillou, Phyliss M. Richardson* and *Harold E. Kirtz.*

For the respondents: *John T. Loughlin, R. Clifford Potter, Scott M. Mendel* and *Dennis P.W. Johnson, Bell, Boyd & Lloyd,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Boise Cascade Corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Boise Cascade is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at One Jefferson Square, Boise, Idaho.

PAR. 2. Respondent Boise Cascade is now, and for many years has been, engaged in the operation of an integrated forest products company. The respondent, among other activities, distributes office supplies, stationery, printing paper, coarse paper and office furniture through its distribution centers across the United States.

PAR. 3. In the course and conduct of its business, respondent Boise Cascade has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act. In the course of that commerce, Boise Cascade has been and is now purchasing office product supplies for resale within the United States from suppliers also engaged in commerce, as "commerce" is defined in the Clayton Act.

In connection with such transactions, Boise Cascade is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and the resale of office product supplies of like grade and quality which are purchased from the same or competitive suppliers. [2]

The aforesaid suppliers are located in the various States of the United States, and respondent Boise Cascade and such suppliers cause the products when purchased by said respondent to be transported from the place of manufacture or purchase to Boise Cascade's retail stores or warehouses located in the same state and various other States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent Boise Cascade has knowingly induced or received from some of the aforesaid suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale favorable to respondent in the commodity purchase transactions described.

For example, respondent resells office product supplies at both the wholesale and retail levels but receives a wholesale discount on all office product supplies it purchases from certain suppliers. These wholesale discounts, however, are not available to all competitors of respondent who sell these products at the retail level.

PAR. 5. The favorable discriminatory prices, discounts, allowances, or terms and conditions of sale were not granted by said suppliers to all of respondent's competitors nor received by all of respondent's competitors in connection with the like or similar purchase transactions of commodities of like grade and quality so purchased for consumption, use or resale.

PAR. 6. When respondent induced or received the discriminatory net prices from its suppliers, as alleged, respondent knew or should have known that such discriminatory net prices constituted discriminations in price prohibited by Section 2(a) of the Clayton Act, as amended.

PAR. 7. The effect of the knowing inducement or receipt by respondent of the discrimination in price, as above alleged, has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products granting such discriminations and other suppliers of such products who do not grant or allow such

discriminations, or between respondent and its competitors not receiving or securing such discriminations.

PAR. 8. The acts and practices of Boise Cascade herein alleged are in violation of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT OF COMMISSIONER PAUL RAND DIXON*

In voting in favor of the order directing the ALJ to consider evidence as relevant because it bears upon the function and service defense set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955), I want to make it clear that I believe a unanimous Commission was correct when it explicitly repudiated *Doubleday* in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), aff'd, 323 F.2d 44 (7th Cir. 1963). *Doubleday,* unlike *Mueller,* does not comport with the language, history or precedent of the Robinson-Patman Act, and should not be revived. In addition, I do not believe that amendments or modifications to the Robinson-Patman Act should emanate from the Commission or commentators no matter how certain they are that the Act is inconsistent with current economic doctrine.

Nonetheless, I do not believe that it is appropriate in these circumstances for me to deny to other Commissioners the opportunity to review and analyze evidence that they may find relevant in their consideration of the case.

I note that from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller.*

DISSENTING STATEMENT OF COMMISSIONER DAVID A. CLANTON**

The majority of the Commission today issues a complaint proceeding on two mutually exclusive, inconsistent theories of violation of the Robinson-Patman Act. On the facts presented, I cannot support this approach.

The first theory, *viz.*, that Boise Cascade has violated the rule set forth in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd,* 323 F.2d 44 (7th Cir. 1963), utilizes, in my view, an unsound, inequitable doctrine. It does not appropriately take account of the value of the services rendered by Boise as a dual distributor, and so leads to a result which is

* Commissioner 1961–1981.
** Commissioner 1976–1983.

at odds with the ideals underlying the Act. Accordingly, I could not support a complaint premised on this theory.

The second theory, based upon our decision in *Doubleday & Co.*, 52 F.T.C. 169 (1955), does examine whether the discounts received by Boise are reasonably related to the services provided by that firm in connection with its sales to end users. Regrettably, because of our preoccupation with *Mueller*, sufficient evidence has not been developed at this time to enable me to determine whether there is reason to believe that Boise is being overcompensated by its suppliers. Since the mere existence of price differentials does not make out a *prima facie* case of violation under the *Doubleday* theory, I am unable to support issuance of the complaint under this approach without further investigation.

DISSENTING STATEMENT OF COMMISSIONER ROBERT PITOFSKY*

The Commission today has issued an extremely unwise Robinson-Patman complaint. I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment.

Let me emphasize that this is *not* the kind of quarrel over the advisability of Robinson-Patman enforcement that has split the Commission in the past. That statute should be enforced by this agency, and I am convinced that sensible cases can be initiated—addressing real issues of injury to competition. I can't believe, however, that a solution to the problem of non-enforcement is this misguided effort.

In the remarks that follow, I don't mean to downplay the difficult policy questions involved in Robinson-Patman enforcement. As is often the case, this division among Commissioners occurs because of the tension between the philosophies of the Sherman Act and the Robinson-Patman Act—a conflict created by Congress and left unresolved on the FTC's doorstep many years ago. That kind of issue generates honest differences that in turn reflect deeply held points of view.

This complaint involves the office supply industry and focuses on the legality of discounts to Boise Cascade, a [2] so-called dual distributor. Before examining the legality of that discount, a bird's eye view of the industry might help.[1]

All agree that the office supply industry is highly competitive. At

* Commissioner 1978–1981.

[1] To the extent this Dissenting Statement makes preliminary factual assertions regarding the office supply industry or Boise, it is based on my understanding of the facts developed by staff during the pre-complaint investigation. When the initial decision in this matter comes to the Commission I will, of course, base my decision solely on the record developed at trial.

the manufacturing level there is extreme deconcentration with some 2900 relatively small companies manufacturing a product line or two (for example, pencils, pens, manila folders, staplers, chairs, etc.). Some of these manufacturers sell directly to large corporate users but most sell through about 6000 intermediate distributors.

While there is a wide variety of intermediate distributors and channels of distribution, we can simplify this discussion by limiting consideration to three categories of distributors:

Contract Stationers. These are relatively large dealers who buy from manufacturers at between 50 and 65% off list and sell directly and only to large users.

Dealers. These are much smaller distributors who usually buy from manufacturers at no better than 40% off list, or from intermediate wholesalers (*see* immediately below) at a price that is roughly the equivalent of 30 or 40% off list. [3]

Wholesalers. This is the category that includes the respondent, Boise Cascade. Boise is a large national wholesaler and buys from manufacturers at 50–65% off list. Unlike contract stationers which frequently buy at the same price, Boise not only sells to large commercial users but also to dealers at roughly a 20 to 30% markup. It is because Boise, unlike contract stationers, is a "dual distributor" that Robinson-Patman questions arise.

Section 2(f) of the Robinson-Patman Act says it's illegal for a company "knowingly to induce or receive a discrimination in price" which is prohibited in other parts of the statute. Where's the discrimination here? No one has suggested there is anything illegal about Boise getting 50 to 65% and the dealers only 40% on those transactions where Boise sells to the dealers. That's a legitimate "functional discount" which compensates Boise for services performed in the sale of manufacturers' products; for example, maintaining an inventory, carrying a full line, distributing catalogs, delivering to dealers on request, etc. Functional discounts are justified on the theory that there can be no injury to competition if they are available to all similar types of sellers in roughly equal amounts.

Problems arise, however, when a company like Boise not only sells to intermediate dealers but sells to large commercial users in competition with those dealers. On those sales, [4] Boise will have received 50 to 65% and the dealers only 40%. Arguably, that's a discrimination in price between competing sellers that leads to an injury to competition, and therefore Section 2(a) of the Robinson-Patman Act is violated; arguably, Boise *knowingly* received that illegal discount and hence violated 2(f). Boise's explanation is that it is not being favored over its dealer customers; rather, the extra 10 to 25% only compensates Boise

for special services it provides which are not furnished by the dealers. These are the same wholesale services for which it can legally be compensated when it sells to dealers. In statutory terms, Boise says there can't be any injury to competition even when it sells to users if the greater discount only pays for the better services it provides.

In the 1950's and 1960's, two contradictory rules of law were developed to deal with this kind of problem. One was the so-called *Mueller* rule (named after the Commission's 1962 decision in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962); *aff'd.* 323 F.2d 44 (7 Cir. 1963)). That rule essentially holds that it is never a defense for a dual distributor to justify a discount in excess of the discount available to dealers with whom it competes by pointing out that the discount is only compensation for valuable services it performs in selling the manufacturer's product. It is a rigid *per se* rule which prevents the issue of "just compensation" from being put to [5] proof.[2] If there is a justification for *Mueller,* it is that any services that the dual distributor performs are valuable not only to the manufacturer but to the dual distributor as well. Since it's difficult to apportion these values, the *Mueller* solution is to allow no compensation defense.

Before *Mueller* was decided, the *Doubleday* rule was the law (named after a 1955 Commission decision, *Doubleday & Co.*, 52 F.T.C. 169 (1955)) *Doubleday* accepted the principle that there could be no injury to competition and hence no violation of the Robinson-Patman Act if the additional discount paid to the dual distributor did no more than roughly compensate the dual distributor for the useful services it provided. In *Doubleday,* the Commission found that the extra discount was not justified and found a violation—showing the weakness of any argument that an absolute *per se* rule is necessary to have any effective enforcement. The heart of *Doubleday* is to recognize that money paid to a dual distributor could be a discriminatory allowance because the dual distributor is a power buyer or could be fair compensation for valuable services, and it puts that issue to proof. [6]

In my view, the *Mueller* rule is anticompetitive, anticonsumer and anti-efficient. In addition, in a fine display of what can be accomplished with a bad rule of law, it's probably anti-small business as well.

1. *Competitive Considerations.* If Boise sold only to wholesalers or sold only to users (as contract stationers do), it is clear that there could be no violation of the Robinson-Patman Act; it is the dual distribution

[2] Technically, Boise could justify receipt of favorable discounts if they were equal to or no more than cost savings enjoyed by its suppliers as a result of dealing with Boise. *See* 15 U.S.C. 13(a) (1970) and *United States v. Bordon Co.*, 370 U.S. 460, 468 (1962). But since Boise's suppliers don't engage in wholesaling, there is no "cost saving" to the supplier and hence no cost justification defense—even though the services Boise performs are highly desirable to both suppliers and customers from a business point of view.

function that creates the problem. But it is well established that dual distribution is pro-competitive. It introduces new competition at both levels at which the dual distributor operates, disrupts possible consensual patterns of price uniformity, and causes or encourages discounting. That sort of competition has always been regarded as desirable from the point of view of the Sherman Act.

If Boise cannot be compensated by its suppliers for expenses incurred in selling the suppliers' products, one possibility is that it will retreat into the wholesale line and like contract stationers, sell only to direct users. Another possibility is that it will discontinue sales to users and sell only to dealers. Either way, competition is diminished. In the past, *Mueller* supporters have occasionally granted that such anticompetitive consequences would occur, but have claimed that a *per se* rule is desirable because losses in competition that may result from that policy [7] were anticipated and recognized by Congress when it enacted the Robinson-Patman Act.

In recent years, there has been increasing recognition of the necessity to reconcile the Sherman Act's demand for competition with the Robinson-Patman Act's legitimate concern that small business not be done in by powerful rivals who are in a position to coerce lower prices from manufacturers. If there were any doubt whether the philosophy of reconciling Robinson-Patman and Sherman Act principles should prevail, a clear answer should have been provided by the Supreme Court in its *A&P* decision last year (where, incidentally, it threw out an earlier 2(f) case brought by this agency). The Court said:

> In the *Automated Canteen* case, the Court warned against interpretations of the Robinson-Patman Act, which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 343 U.S. 63. Imposition of 2(f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.

The *Doubleday* approach which allows distributors to be compensated, but not over-compensated, for services allows that reconciliation; the *Mueller* rule seems to me a classic example of an R–P approach in "open conflict with the purposes of other antitrust legislation."[3] [8]

2. *Anti-consumer Aspects.* One thing is fairly sure if a Commission majority prevails in its effort to resuscitate *Mueller*—that is, users will pay more for pencils, pens, staples, and so forth. This could be true because, as indicated above, competition will be reduced when dual distributors are forced to choose among different lines of distri-

[3] The Department of Justice apparently felt the same way in 1968 when it filed an *amicus* brief in the Supreme Court opposing the Commission's *Mueller* approach, *see Purolator Products, Inc. v. FTC*, 389 U.S. 1045 (1968).

bution. Another possibility is that dual distributors will continue to operate on both levels, but when denied a discount from manufacturers on sales to users, will find it necessary to raise price to users. The money charged to users will then go into the pockets of manufacturers who are prevented by law from paying a functional discount.

Alfred Kahn discussed this very issue in 1954:

> The denial to combined wholesaler-retailers of the buying prices to which their performances of wholesaling functions entitles them remains an unquestionably rigid, anti-competitive—indeed discriminatory—solution.

See Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy:* (1954) at 251.

3. *Anti-efficiency Concerns.* The *Mueller* rule is also undesirable because of the powerful way it undermines the ability of businessmen (including small businessmen) to do business in an efficient way.

The present complaint is as clear an example of this as one could find. Remember that this is an industry in which thousands of small manufacturers tend to make a single line or two of products. As a result, there are no [**9**] manufacturers who have the economic incentive to go into the business of wholesaling their own products since the central feature of wholesaling is the availability of a wide line of supplies.

Boise and other dual distributors have introduced into the industry the idea of building large computerized wholesale establishments which simultaneously can serve the needs of small dealers and commercial users. But under *Mueller* once a dealer becomes a dual distributor, any preferential discount on sales made in competition with its own customer-dealers will be illegal. Obviously, dual distribution will be discouraged. This is true no matter how valuable to the manufacturer the service performed by the dual distributor, no matter how efficient it is to have an integration of functions within a single distributor (or to have the distributor rather than the manufacturer do it), and no matter how valuable and desirable the arrangement is to the consumer.

4. *Small Business Impact.* The idea of a *Mueller* rule is to protect small businesses against dual distributor competition—an approach which Commissioner Dixon rightly points out has been viewed in the past as consistent with the purpose of the Robinson-Patman Act. The irony is that its application may end up hurting small businesses more than a less rigid approach. [**10**]

This effect occurs because many small dealers enter cooperative ventures which jointly purchase inventory and provide some of the

same wholesale functions offered by firms like Boise. But if an inflexible *Mueller* rule is applied, those small businessmen, who already know enough to protect their own competitive interests, will be denied a discount compensating them for the costs of their wholesaling if they both sell to and compete with other dealers. *See* Calvani, *Functional Discounts Under the Robinson-Patman Act,* 17 Boston Coll. Ind. and Comm. L. Rev. 543, 555 (1976).

The Commission here is proceeding, at least at this point, on a *Mueller* theory. To cushion the shock of resort to this approach, an order has simultaneously been issued which will permit Boise to introduce the kind of evidence, described above, that would be relevant only under a *Doubleday* standard.[4]

To say the least, that unusual approach—indicating that the case may be tried under two thoroughly inconsistent theories—will introduce great uncertainty into the law. Businessmen, for a considerable period of time, will not know whether to run their businesses (and keep records) as if [11] *Mueller* or *Doubleday* were the law. The approach is particularly unfair to Boise, the respondent in this case. It knows that it can't win this case under *Mueller* (no favored dual distributor could); it asserts it can win the case under *Doubleday.* It therefore must take the risk of an expensive defense, knowing that it may find after several years that a majority of the Commission still thinks that all the evidence it introduces is irrelevant under the *Mueller* standard. This confusing approach might be justified if there were any reason to believe that the Commission would be in a better position after a trial to choose between the *Mueller* and *Doubleday* standards. But that just isn't so. The whole point of a *Mueller* rule is to make discounts to dual distributors absolutely illegal, regardless of services performed to earn them, and the pros and cons of that approach are as apparent now as they will ever be. Thus, in an area where the Commission would serve all its constituencies by clarifying the law, it manages here to do the opposite.

It's fashionable these days to be in favor of deregulation—that is, to oppose excessive and unjustified government regulation of price and entry as a substitute for the operation of competitive forces. But over-regulation comes in many guises. It's one thing to try to protect, under the Robinson-Patman Act, small businessmen from power sellers and power buyers; it's another thing to resuscitate [12] a rule that discourages dual distribution—thereby raising entry barriers at the

[4] Because of the way this case has been investigated and presented to the Commission, I can't tell whether a complaint based on *Doubleday* would be proper. Accordingly, lacking reason to believe a violation has occurred on a valid *Doubleday* approach, I must vote against the complaint.

wholesale or dealer level—by denying to those affected by the rule the opportunity to argue that there has been no injury to competition.

The Commission's separate order, directing the Administrative Law Judge to admit evidence on the question of injury to competition, does imply that at least some Commissioners may eventually move away from the *Mueller per se* approach. However, for the reasons I've indicated, I believe it is preferable to accomplish that result now in a clear and direct fashion. In my view, this complaint should never have been issued and an advisory opinion clarifying the Commission's views on the *Mueller* and *Doubleday* rules should have been promptly published.

STATEMENT OF COMMISSIONER DIXON IN RESPONSE TO MOTION FOR RECUSAL

I cannot agree with respondent Boise Cascade Corporation, Inc. ("Boise") that my statement issued concurrently with the issuance of the complaint demonstrates prejudgment by me of the merits of this case.

The statement challenged by Boise was issued to make clear the basis on which I voted to issue the complaint. While a majority of the Commission agreed to issue a complaint against Boise, Commissioners disagreed on the appropriate legal standard to be applied to the investigatory record in order to determine whether there was "reason to believe" that a violation of law had occurred. One possible legal standard would make available the "function and service" defense as set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955). An alternative standard was the one set forth in *Mueller Co.*, 60 F.T.C. 120 (1962), aff'd., 323 F.2d 44 (7th Cir. 1963). This conflict was made clear to respondent by my statement, by statements of Commissioners Pitofsky and Clanton, and by an order of the Commission requiring the ALJ "to enter [2] findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

As respondent Boise recognizes, a Commissioner must have "reason to believe" that the facts disclosed in the investigatory record indicate a violation of law before he or she may vote for the issuance of a complaint. My review of the record persuaded me that there was "reason to believe" that a violation of law had occurred whether judged by the *Doubleday* or the *Mueller* standard, and my statement says no more than this:

> from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller*.

Respondent argues that my statement goes "much further" than an expression of the statutory standard to be met in issuing a complaint, and characterizes it as showing "that he [Dixon] has weighed the evidence and concluded even before any trial that Boise is guilty regardless of whether the evidence is examined under either the *Mueller* or the *Doubleday* standard."

This recasting of my words quoted above is entirely gratuitous. If I did not have "reason to believe" that a violation of law could be found from the evidence presented to the Commission prior to issuance of its complaint, I would have had no legal basis to vote for a complaint. Since the law requires me to have "reason to believe" that a violation of law may be found before I can vote to challenge it, I cannot see how the recitation of that fact can amount to prejudgment, and, indeed, I have not prejudged this case. If I am called upon to adjudicate the merits of this matter, [3] my judgment will be based solely upon the trial record compiled by the litigants. The Commission has frequently dismissed cases for failure of proof after originally finding "reason to believe" that a violation has occurred. Since I fail to discern how a reasonable person reading my statement could conclude that I have prejudged the merits of this case, I will not recuse myself from this matter.

Finally, I note that complaint counsel argue that this matter is not properly before the Commission in the absence of a certification by the ALJ. However, since disqualification is a question uniquely within the province of the Commissioner at whom the motion to disqualify is directed, I have addressed the merits of respondent's motion, and believe it is appropriate for it to be raised before the Commission.

January 30, 1981

Initial Decision by

Lewis F. Parker, Administrative Law Judge

February 14, 1984

I. History of the Proceeding

On April 23, 1980, the Commission, with Commissioner Pitofsky dissenting, issued a complaint charging that Boise Cascade Corporation ("Boise") had violated Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that Boise distributes office supplies, stationery, printing paper, coarse paper, and office furniture through distribution centers

located throughout the United States. The complaint further alleges that Boise has been and is engaged in commerce, as "commerce" is defined in the Clayton Act and that in the course of that commerce, it purchases office product supplies for resale within the United States from suppliers who are also engaged in commerce. [2]

The complaint claims that Boise competes with other businesses which are engaged in the purchase and resale of office products of like grade and quality which are bought from the same or competitive suppliers, and it charges that Boise, in the course of its business, has knowingly induced or received from some of its office product suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale which were not granted by its suppliers on sales of goods of like grade and quality to all of its competitors; it further states that Boise should have known that the prices it induced or received constituted price discriminations prohibited by Section 2(a) of the Clayton Act, as amended.

Finally, the complaint alleges that Boise's knowing inducement or receipt of the price discriminations has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products or between Boise and its competitors.

As an example of the violation alleged, the complaint states that Boise resells office product supplies at both the wholesale and retail level, but receives a wholesale discount on all products purchased from certain suppliers. These discounts are allegedly not available to all of Boise's competitors who sell the products at the retail level.

Boise's alleged dual function—*i.e.*, sales at the wholesale and retail levels of goods it purchases at wholesale discounts—prompted the Commission to direct me, in an order accompanying the complaint, to admit evidence of the services and functions performed by Boise on goods it purchases for resale at the retail level, and after considering *Mueller Co.*, 60 F.T.C. 120 (1962), *affd*, 323 F.2d 44 (7th Cir. 1963), *cert denied*, 377 U.S. 923 (1964) and *Doubleday & Co.*, 52 F.T.C. 169 (1955), to decide the materiality of such evidence. The Commission also ordered me to "enter findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

Because it received a stay in this proceeding from a federal district court, Boise, was not required to file its answer until November 3, 1980, an answer which essentially denied all of the charges in the complaint and interposed fourteen separate defenses.

After extensive and time-consuming discovery, evidentiary hearings began on April 13, 1982. The hearings concluded on April 27, 1983. Because of a complicated dispute over the application of the attorney-client and work product privileges to a Boise document and the testimony of one of its former employees, the record was not closed

until August 17, 1983. The parties filed their proposed findings of fact, conclusions of law and proposed orders on September 16, 1983. Answers were filed on November 14, 1983. [3]

At my request, the Commission granted me an extension of time to February 27, 1984 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been accepted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. Findings of Fact

A. *Boise's Business Activities*

1. Boise is an integrated forest products company which is organized, exists and does business under the laws of the State of Delaware and whose headquarters is located in Boise, Idaho. It is engaged principally in the manufacture, distribution and sale of paper, packaging, office products, wood products, and building materials (Ans.; CX 17B).[1] Its total sales for 1980 exceeded $3 billion, of which more than $853 million were attributable to its packaging and office products business. The Office Products Division's total net sales in 1980 were [I.C.] (CX's 30, 17Z–28).

2. The headquarters of Boise's Office Products Division is located in Itasca, Illinois, and it operates through distribution centers located in twenty-seven cities (CX 48D).

3. Boise entered the business of distributing office products through the acquisition of Associated Stationers Company and Honolulu Paper Company in 1964 (Tr. 116–17; CX 672, p. 10). Since the acquisition of Associated Stationers, Boise has expanded to the nationwide distribution of office products [4] primarily by acquiring other office products distributors (Tr. 5074–76; CX 672, pp. 10, 56).

4. Boise's Office Products Division is decentralized in its operation (Tr. 5070). Each distribution center is a profit center, responsible for

[1] Abbreviations used in this decision are:

CX – Commission Exhibit
RX – Respondent's Exhibit.
Tr. – Transcript page.
CPF – Complaint counsel's proposed findings.
CRB – Complaint counsel's reply brief.
RPF – Respondent's proposed findings.
RRB – Respondent's reply brief.
Ans. – Boise's answer to the complaint.
F. – Finding in this decision.
I.C. – *See in camera* findings.

tactical planning, inventory management, purchasing for its needs, warehousing, sales and customer service (CX's 48D, 34R). Strategic planning, merchandising and catalog production, the negotiation of discounts from manufacturers, data processing and computer operations, financial accounting, and credit management are handled by the Itasca headquarters (CX's 48D, 34R, 973, p. 150).

5. Boise operates as a dual distributor, selling both to office products dealers and end-users. Based only on its wholesale sales (*i.e.*, sales to dealers), Boise is one of the two largest wholesalers in the country (Tr. 4913). Boise is the largest office products distributor in the industry (Tr. 4548, 5127; RX 501; CX 45G).

6. Although "office products" may be defined as stationery, office supplies, office furniture, office equipment, office machines, and related items (CX 352, p. 4), the term is used in this decision to include stationery, supplies, and furniture, but not equipment and machines.

B. *Participants In The Office Products Industry*

1. Manufacturers

7. Office products are produced by more than 1,000 manufacturers (Tr. 962–64, 1220–21, 1669, 5069, 1832, 4788) who sell their goods to both wholesalers and dealers (Tr. 766, 1523, 2856, 2228–29). Some manufacturers also sell directly to end-users but this practice is not particularly prevalent in the office products industry (Tr. 766, 879, 1116, 1582, 2739, 3178, 3240, 3555; CX 702, pp. 74–75).

2. Manufacturers' Prices

8. Price in the office products industry is usually expressed as a discount off manufacturer's suggested list price (Tr. 6592). The discount may take the form of a chain discount, for example, 50–20%. Assuming a manufacturer's suggested list price of $1.00, a 50–20% discount means a 50% discount is first taken, leaving 50 cents. Then a 20% discount is taken from the fifty cents, leaving forty cents as the selling price (Tr. 817, 2730). [5]

a. *Quantity And Volume Discounts*

9. Manufacturers often offer some form of quantity pricing whereby an order for a larger quantity of a product or group of products is priced lower on a per unit basis than an order for a smaller quantity (F.'s 114, 168, 260, 293–96, 298, 343).

10. Some manufacturers offer only quantity discounts whereby any customer buying a given quantity receives the same price (Tr. 6713–14, 6625–26, 6640); other manufacturers offer volume discounts whereby dealers who buy more than a certain volume on an annual

basis will receive a larger discount than other dealers (F.'s 172, 225, 227, 229).

b. *Wholesale Discounts*

11. Manufacturers also offer wholesale discounts along with quantity or annual volume discounts. This is a common practice, according to Mr. Clay Barth who was employed from 1956 to 1982 by Rediform and who held management positions with that company in marketing and operations (Tr. 758–60). He testified:

Q. Mr. Barth, did you say that the 50/20 discount that you extended to wholesalers is a functional discount?

A. Yes.

Q. In your opinion, is it a trade practice to give a wholesale functional discount to wholesalers?

A. It is a trade practice which is very general and very broad; it is not ours only, in other words (Tr. 833).

12. Other knowledgeable industry members confirmed the widespread existence of wholesale functional discounts in the office products industry. Mr. Hal Webb, who had been President or Chairman of the Board of Master Products for twenty-three years (Tr. 1885), stated that such discounts are common (Tr. 1979–80), as did Mr. Jones of Kardex (Tr. 1596). Mr. Bernard Seltzer, who has been Executive Vice President of the Wholesale Stationers' Association for over eleven years, guessed that about half of the 200 manufacturer members of WSA give such discounts (Tr. 6587–88, 6593–95). Mr. Philip Rhodes, who has been in the industry over forty years and is Chairman of the Board and Chief Executive Officer of one of the five national [6] wholesalers, S.P. Richards, testified that in his estimation 60 to 70% of vendors selling to his company gave it a wholesale functional discount, and that more than 60 to 70% of his company's total purchases were from vendors giving such a discount (Tr. 6803, 6806, 6814–15). In fact, Mr. Rhodes believes that in the past decade the number of manufacturers offering a wholesale functional discount has increased (Tr. 6817).

13. Dr. Kenneth Elzinga, a professor of economics at the University of Virginia, who testified as an expert witness for Boise, reached a different conclusion after reviewing the record in this case. He testified that the pricing of the six manufacturers complaint counsel chose to illustrate price discriminations favoring Boise is not representative of pricing in the office products industry. In his opinion, "most manufacturers . . . sell on what might be called a quantity or volume discount basis, not on a functional discount basis" (Tr. 6097). I disagree, for I believe that the experience of industry members who testi-

fied in this case outweighs that of Dr. Elzinga who had no knowledge of the industry before he was hired by Boise (Tr. 6134–35).

14. Since a wholesaler purchasing from a manufacturer who gives wholesale functional discounts pays a lower price than a dealer buying similar quantities (Tr. 6813; CX 974, pp. 99–100), this discount is attractive to a wholesaler such as Boise, as is apparent from the stipulated testimony of Mr. Gerald Twietmeyer, who worked in a management capacity for Boise from 1968 to 1978 (Tr. 6739–42):

> As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesale functional discounts from various office products vendors and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer or contract stationer.
>
> The results of this study were consistent with the understanding I had of the discounts Boise received from such vendors based on my experience in the industry and with Boise (Stipulation of the Parties dated August 15, 1983; Order Receiving Stipulation into Evidence and Denying Boise Cascade's Request for *In Camera* Treatment dated August 17, 1983). [7]

c. *Bid Discounts*

15. In some cases, end-users who need large quantities of office products will ask for bid pricing from manufacturers which is different than prices that are normally offered (Tr. 1170–71, 879, 1028–29, 2293, 1974; CX 975, p. 41).

16. Sales through bids do not constitute a large portion of office product manufacturers' sales. Representatives of manufacturers who testified in this proceeding estimated that such sales ranged from less than 1% to 8% of total sales (Tr. 1028–29, 1636, 1171, 2851, 1975).

17. Some manufacturers' bid discounts may be equal to their normal wholesale functional discounts (Tr. 1171); some are greater than the dealer discount but less than the wholesale functional discount (Tr. 816, 879–80). Some manufacturers may limit bid prices to government purchases (Tr. 1170–71, 879, 1028).

18. Manufacturers offer the same bid discount to all customers requesting prices for a particular bid (Tr. 2851, 2294).

19. Some dealer witnesses testified that their purchases at special bid prices were a small portion of their total purchases (Tr. 3206, 3878, 3487, 707–08, 2564, 2662–65).

d. *Promotional Discounts*

20. Manufacturers also offer promotional discounts to their customers in addition to quantity or functional discounts and special bid prices. These promotional discounts may be in the form of additional year-end discounts, credits, the payment of cash to purchasers or their

salesmen, extensions of time in which to pay, and extensions of the application of price increases (Tr. 1202, 2403–04, 2856–57, 1462–63, 2370–73, 2316–19, 3070–71, 1707, 3578–82, 2137–39, 2110–12, 3850–52, 710–11, 746–47, 2130, 4630, 5036–37, 6632, 4445–48, 3879). In some cases, these discounts are not reflected on manufacturer's invoices (Tr. 2110–12, 2139).

21. Although one manufacturer's testimony suggests that wholesalers might not be able to use all the promotional discounts offered to dealers (Tr. 2317–18), others testified that they offer the same promotion to all customers (Tr. 1202, 2404). Concerning promotions, Clay Barth, who has worked for Rediform Office Products since its creation in 1956 (Tr. 758), stated: [8]

> When we go to market through retail and wholesale we deliberately try not to give advantage one way. We don't tilt the thing. It would be stupid to try to do something with a retailer and not let the wholesaler do it when we let the wholesaler sell to the retailer (Tr. 912).

22. In one case, wholesalers were given an advantage over dealers. B&P's "one buy-in and one buy-out" promotion provided wholesalers with an additional 5% discount on any group of products the wholesaler might select. B&P did not restrict the number of these promotions a wholesaler could have. A wholesaler could have had it twelve times a year if it wished (Tr. 2856–57).

3. Wholesalers

a. *Industry Definition Of Wholesaler*

23. A wholesaler is generally defined in the office products industry as a buyer for resale to dealers (CX 974, pp. 10–11).

24. The National Office Products Association's by-laws define wholesaler members as:

> Firms that buy stationery, office supplies, office furniture, and equipment and related items on their own account for resale to retailers in the course of which they warehouse the merchandise; promote the sale of the merchandise; service the retailer and advise him on his retail merchandising and buying program . . . (CX 352, p. 5).

25. Under the by-laws of the Wholesale Stationers' Association, wholesale sales are sales made to retailers or dealers for resale to other customers (Tr. 6610; CX 2002D).

b. *Volume Of Sales*

26. According to an estimate by Boise, the wholesale sales (sales to dealers) of the five so-called national wholesalers in 1979 were: [9]

Boise	$138,000,000
United Stationers	$132,000,000
S.P. Richards	$103,000,000
Champion	$ 91,000,000
Zellerbach	$ 80,000,000

(CX 51Z–34)

27. Most wholesalers, however, are small, privately-owned businesses with annual volumes of under $10 million (CX 2004A).

c. *Geographic Areas Served*

28. Although most wholesalers are small, privately-owned businesses, there are five wholesalers that operate in numerous locations: United Stationers, Boise, S.P. Richards, Champion and Zellerbach (Tr. 4914). Each of these so-called national wholesalers is not in every city, but they account for approximately 60% of the total volume of wholesale sales (Tr. 4914–15; CX 51Z–34).

d. *Catalogs*

29. National wholesalers publish catalogs which are sold to dealers (Tr. 2493–94, 3550). Most local wholesalers do not produce a catalog (Tr. 5127). Wholesalers' catalogs vary as to the number of items depicted. For example, United Stationers' catalog has 20,000 items while Boise's catalog has about 8,500 items (Tr. 4607–08, 5561; CX 62).

e. *Wholesalers' Competition With Manufacturers And Their Knowledge Of Manufacturers' Prices*

30. Wholesalers view manufacturers as competitors for dealers' business (CX 977, p. 89), and they are therefore interested in the prices at which manufacturers sell to dealers. Mr. Philip Rhodes, Chairman of the Board and Chief Executive Officer of S.P. Richards, a wholesaler, testified that his firm was interested in vendors' pricing to dealers "because we like to be competitive. We like to be able to sell at a price where we would be competitive and obtain a share of that business" (Tr. 6806).

31. Robert Sherman, President of L.D. Sherman, a San Francisco wholesaler, testified that the wholesale functional discount is vital because if he buys at a price equal to the [10] price at which dealers do, he will not be competitive on his resale of the product to dealers (Tr. 6583).

32. Everett Patterson, who is general manager of a dealer in Massachusetts, had worked as a merchandise manager for Champion Office Products, a wholesaler, and he placed orders with manufacturers, dealt with the local salesmen, and maintained the local pricer (*i.e.*, price list) (Tr. 6540). Mr. Patterson testified that it was essential for

him to know what the dealer pricing was from the manufacturer because the wholesaler's salesmen have to know the price their dealer customers could obtain the goods for if they bought directly from the manufacturer (Tr. 6540–41).

33. Bernard Seltzer, Executive Vice President of the Wholesaler Stationers' Association, explained that officers of WSA have encouraged manufacturers to give wholesalers a wholesale functional discount because they have to compete with manufacturers for sales to dealers. Volume discounts are not substitutes for wholesale functional discounts because, according to Mr. Seltzer "not every wholesaler is able to buy in large volume. WSA and the industry has very many small wholesalers whose volume would not justify a large discount, but who perform a function that justifies a discount" (Tr. 6596).

34. Although dealers may not know the pricing practices of particular manufacturers, they know that wholesalers receive better prices than dealers (Tr. 3637–38, 7242, 4307–08, 2172; CX 702, p. 17).

35. In explaining why he viewed Boise differently than his other competitors, Louis Applebaum, Executive Vice President of A. Pomerantz & Co., a large Philadelphia dealer, testified:

> Boise's prices generally, in our opinion, are lower because they are buying products at lower prices than we are.
>
> Q. Do you have an opinion as to why that would be?
>
> A. It is my opinion that they are using their wholesale discounts, wholesale functional discounts in the costing of the products in competing with us (Tr. 1341–42).

36. In the mid-1970's, Boise received complaints from several dealers who objected to its competition with them (Tr. 5093–96). The primary industry trade association, the National Office Products Association ("NOPA"), also received complaints from dealers in the early to mid-1970's about Boise's dual distribution; they argued that they could not purchase from [11] manufacturers at prices as low as Boise and that Boise was selling to their end-user customers at prices the dealers could not compete with. A copy of the complaints was given to Boise (Tr. 1798; CX's 105, 438A, 439B).

37. Robert Welnhofer is Vice President, Corporate Development, for United Stationers, a national wholesaler. He was General Manager of Boise's Office Products Division from 1965–1967 and 1970–1977, and from 1967–1970 had a number of other management positions with Boise (CX 672, pp. 5–8). Mr. Welnhofer testified that Boise regularly discussed their pricing policies with manufacturers "because one of our objectives is to become knowledgeable about the industry and how products are bought and sold" (CX 672, pp. 125–26).

38. Mr. Welnhofer noted that some wholesalers even designate on their own price lists to dealers the price the dealer will pay if the

dealer buys from the manufacturer instead of the wholesaler. The wholesaler does this to show the dealer that he can buy at as good a price from the wholesaler as from the manufacturer; to do this, the wholesaler has to know the manufacturer's prices to the dealer (CX 672, pp. 125–27).

39. George Harig, who is employed by Boise at its headquarters and deals with manufacturers, told the management of Dennis Office Supply, a Boston dealer, that, after its acquisition by Boise, Dennis would be entitled to wholesale discounts which Dennis did not obtain as a dealer, and that as a result there would be lower cost of goods sold and more profit (Tr. 6560–61).

40. Craig Hajduk is a Boise Product Manager who is responsible for binders, the loose-leaf section, all writing instruments, word processing, data processing, attaches, art supplies and drafting (CX 971, p. 7). He testified that one of the ways certain manufacturers encourage the sale of their products through wholesalers is to charge a lower price to wholesalers than to dealers, and that this would be a positive factor for Boise in deciding whether to take on the vendor's line (CX 971, pp. 102–03). In further explaining how manufacturers have pricing that encourages wholesalers, Mr. Hajduk stated:

> [I]f the pricing structure as presented to someone like myself, where the pricing structure for a dealer versus wholesale and where Boise's pricing in that realm would be, if there is a large difference, it obviously would be more advantageous for us to take on a line where we feel confident we can get a lot of dollars and a lot of potential sales versus a line where pricing to the dealer is the same as the pricing to us (CX 971, pp. 106–07). [12]

41. In addition to considering the size of a manufacturer's wholesale functional discount in deciding whether to carry a line, Mr. Hajduk considers the manufacturer's price to the dealer in setting Boise's wholesale price to dealers. This is because it would be undesirable for Boise's price to dealers to be significantly higher than the manufacturer's price to dealers. This is especially true on popular lines or items (CX 971, pp. 72–76).

42. "Buyers Guides," which are used by buyers in each of Boise's distribution centers, are sent to them from its Itasca headquarters (CX's 973, p. 37; 974, pp. 21–23). These guides disclose both Boise's buying terms and the manufacturers' published selling policies to dealers (CX's 116–20, 158–59, 181–83, 219–22, 267, 321). The pricing information in the guides is provided, usually by telephone, by the manufacturer (CX 971, p. 8). Information on dealers' prices was eliminated from the guides in about 1982 (Tr. 4824).

4. Dealers

a. *Industry Definition Of Dealers*

43. As used in the office products industry, a dealer is a firm or individual that purchases office supplies, furniture, equipment and related items for resale to users (Tr. 1547, 2204, 775, 1095–96; CX's 352, p. 5; 974, pp. 10–11).

44. The term "contract stationer," while having no generally accepted meaning in the office products industry, is sometimes used to refer to large dealers, but it also may mean any dealer that has contracts with customers (Tr. 5071–72, 6508). Because small and medium sized dealers have contracts with large industrial customers, the term contract stationers may also apply to them (Tr. 5071–72).

b. *Dealers' And Manufacturers' Use Of Wholesalers*

45. Dealers purchase substantial amounts of office products from wholesalers for resale to their own customers (Tr. 3799, 3355, 3028, 3660, 3540–41, 4212, 2492, 651, 2034, 4074, 3421–22, 2427, 3136; CX 702, pp. 119–20).

46. Dealers recognize that wholesalers such as Boise provide valuable services to them, such as a broad inventory, which allows dealers to operate without carrying in their own inventory products their customers need (Tr. 715–16, 4076, 4811–12, 2462–63; CX's 702, p. 123; 974, pp. 88–89; 672, pp. 164–67), [13] faster delivery than from manufacturers, and improvement in cash flow (Tr. 2034–35, 2973, 3322–23, 3300, 3660, 3541; CX 702, p. 122). Without wholesalers, either the dealers or manufacturers would have to maintain more inventory, which would increase their costs (Tr. 715–16, 1681–82, 4076, 4811–12, 2462–63; CX's 974, pp. 88–89; 672; pp. 164–67). Wholesalers also help set up new dealers, aid manufacturers in introducing new products and provide services which, if they did not exist, manufacturers would have to provide (Tr. 2356, 1587, 1272–73, 2340, 1229–31, 1674–83, 1694–96).

c. *The Increase In The Number of Dealers*

47. There are some 8,000 office products dealers in the United States, and according to data compiled by Dr. Elzinga from the National Office Products Association and American Business Lists, there has been a steady increase in the number of dealers from 1976–1982 both nationwide and in the states where complaint counsel's dealer witnesses are located (RX 801–03; CX 2302–03).

C. *Boise's Office Products Division*

1. Boise's Entry Into Office Products

48. Boise entered the office products industry in 1964 through the acquisition of Associated Stationers Company, a wholesaler that operated retail stores under the name of Horder, and the Honolulu Paper Company, an office products dealer with retail stores (Tr. 5116–17; CX 672, pp. 10, 88).

49. Subsequently, Boise entered new areas by acquiring office product dealers or wholesalers (Tr. 5075–76, 5554, 4934–35, 3980–81, 3034–35, 4435–36, 2914–15, 5154; CX 977, pp. 26–27).

50. When Boise purchased Dennis Office Supply in Boston, a dealer, it became acquainted with the prices at which Dennis bought. In fact, Dennis bought directly from the manufacturers involved in this case (Tr. 4443–45; CX 970, p. 124).

2. The Location Of Boise's Distribution Centers

51. Boise has distribution centers located in twenty-seven cities and ships office products into all fifty states (CX 48D; F. 59). The eight distribution centers that are involved in this case make sales in the following geographic areas: [14]

Boston (Burlington): East New York, Massachusetts, Maine, Vermont, New Hampshire, Rhode Island, Central and Northern Connecticut.

Moonachie, New Jersey (New York): New York metropolitan area.

Philadelphia (Pennsauken, New Jersey): Southern New Jersey, Eastern Pennsylvania, Delaware, parts of Maryland and Washington, D.C.

Phoenix: Northern Arizona.

Portland: Oregon, Western Idaho.

Salt Lake City: Utah, Eastern Idaho, Western Wyoming.

San Francisco (Brisbane): Northern California, Northern Nevada.

Seattle: Alaska, Washington, Northern Idaho, Western Montana (Tr. 4435–36, 5678, 5680, 5626; CX's 630C, 975, p. 24; 65C).

3. The Division's Sales Volume

52. Boise's Office Products Division's combined wholesale and retail sales make it the largest distributor of office products in the United States (Tr. 5127, 4548; CX 45G; RX 501).

53. Considering only its sales to dealers, Boise is one of the two largest wholesalers in the United States (Tr. 4913).

54. For 1976, Boise's total net sales to users (including sales through

Boise's retail stores and sales to commercial accounts) and to resellers were:

Sales to Users	[I.C.]
Sales to Resellers	[I.C.]
Other Revenues	[I.C.]
Total Net Sales	[I.C.]

(CX 18).

55. For 1977, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were: **[15]**

Sales to Users	[I.C.]
Sales to Resellers	[I.C.]
Other Revenues	[I.C.]
Total Net Sales	[I.C.]

(CX 21).

56. For 1978, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

Sales to Users	[I.C.]
Sales to Resellers	[I.C.]
Catalogs/Marketing Aids	[I.C.]
Total Net Sales	[I.C.]

(CX 24).

57. For 1979, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

Sales to Users	[I.C.]
Sales to Resellers	[I.C.]
Catalogs/Marketing Aids	[I.C.]
Total Net Sales	[I.C.]

(CX 27).

58. For 1980, Boise's total net sales to users (including sales through Boise's retail stores and sales to commercial accounts) and to resellers were:

Sales to Users	[I.C.]
Sales to Resellers	[I.C.]
Catalogs/Marketing Aids	[I.C.]
Total Net Sales	[I.C.]

(CX 30).

4. The Distribution Centers' Sales Volume

59. Some Boise distribution centers do not currently solicit end-user accounts. These are: Tampa, Miami, [16] Jacksonville, Atlanta, Nashville, Charlotte, Cincinnati, Cleveland, Indianapolis, Milwaukee, Minneapolis, Houston and Denver. Those that currently solicit end-users are: Honolulu, Seattle, Portland, San Francisco, Los Angeles, Tucson, Phoenix, Salt Lake City, Chicago, Dallas, Boston, New York, Philadelphia and Detroit (Tr. 5074–75).

60. Annual sales of office products for the eight Boise locations focused on in this case were:

	1976	1977	1978	1979	1980
Boston	[		I.C.		]
New York	[		I.C.		]
Philadelphia	[		I.C.		]
Phoenix	[		I.C.		]
Portland	[		I.C.		]
Salt Lake City	[		I.C.		]
San Francisco	[		I.C.		]
Seattle	[		I.C.		]

(CX 630D–E).

61. The 1980 dollar and percent breakdown of sales to dealers and users for the eight distribution centers being focused on in this case was:

	Sales to Dealers	Sales to Users	Total Sales
San Francisco	[	I.C.	]
Seattle	[	I.C.	]
Portland	[	I.C.	]
Salt Lake City	[	I.C.	]
Phoenix	[	I.C.	]
Philadelphia	[	I.C.	]
New York	[	I.C.	]
Boston	[	I.C.	]

(CX 630E).

5. Boise's Dual Distribution Strategy

62. Boise has always sold both for resale (to dealers) and direct (to commercial accounts). This policy originated through Boise's acquisition policy in the 1964–1966 period (CX 44A).

63. Boise's marketing strategy has been to make dual distribution

a viable marketing concept. Boise's 1977–1981 Business Plan noted that although Boise "has always encountered a [17] negative dealer attitude towards its selling direct," both its "direct and wholesale business are important; it is impractical to withdraw from either" (CX 44H).

64. Some distribution centers do not actively solicit commercial accounts because, according to Boise's 1977 Manager's Year-End Review of Operations:

> It is beginning to be understood internally that while the Division is a dual operator, we may also maintain pure wholesale operations based on: 1) inadequate industrial potential in the community, and 2) ability to grow and meet our [Return of Investment] objectives as a wholesaler (CX 37D).

6. Source Of Products

65. Boise carried products from about 250 vendors in its 1982 catalog (Tr. 4839); however, it purchased some products from about 1,800 vendors (Tr. 4784–85).

66. Boise's Itasca headquarters makes the decision as to which manufacturers' lines are to be carried in Boise's catalog and negotiates with the manufacturers (CX's 48D; 34R; 973; pp. 150–51; 2077, pp. 8–9).

67. Boise distribution centers are responsible for their own inventory. The purchasing department at each location places its orders directly with the manufacturer, who in turn ships the goods directly to the individual location that placed the order (CX's 975, pp. 34, 36; 973, pp. 30, 32; 48D). Correction of any billing errors associated with its orders from manufacturers are negotiated by each Boise location, not by the central office in Itasca (CX's 975, pp. 36–37; 973, pp. 32–35).

68. In deciding on which manufacturers it should purchase from, Boise considers market acceptance and quality of the product, manufacturer service, price as compared with that of other manufacturers, potential profitability, and whether the manufacturer gives a wholesale functional discount (Tr. 4795–96, 4836–37; CX's 672, pp. 5–8, 148–49; 2077, p. 11; 1022, 51R, 970, pp. 23–24; 971, pp. 106–07).

69. The market acceptance of some products sometimes dictates that Boise purchase them even though it might prefer to drop them (CX's 2077, pp. 21–24, 44–48; 976, pp. 66–67; 971, pp. 63–64). [18]

7. The Distribution Centers' Inventory

70. The wholesale-commercial mix of customers served by a distribution center and its size are two factors that affect what percent of the items in Boise's catalog each distribution center stocks (CX 970, pp. 46–47). Boise locations that are primarily wholesale, serving the

dealer market, are required to stock all the catalog items (Tr. 4839; CX 971, pp. 66–67). The distribution centers with stronger commercial sales stock only as much of the catalog as they deem necessary (Tr. 4839; CX 971, pp. 66–67). These centers thus operate more like dealers than wholesalers (*See also* F. 71).

71. In stocking inventory, Boise's fill-rate goal is 90% for commercial accounts and 85% for dealer accounts. The lower fill-rate goal for dealer accounts exists because (Tr. 4580; CX's 976, pp. 135–36; 974, pp. 84–85; 91Z–46, 64Z–13):

> The dealer customer tends to purchase within a much wider spectrum of items contained in the industry. Our branch operations for the dealer need to, therefore, stock more in terms of quantities and types of items related to our catalog than our commercial operations (CX 970, pp. 45–46).

72. On October 26, 1978, the number of items stocked by the locations focused on in this case were:

Boston (BOS)	[I.C.]
Pennsauken (PEN)	[I.C.]
Moonachie (NYC)	[I.C.]
Salt Lake City (SLC)	[I.C.]
San Francisco (SFO)	[I.C.]
Seattle (SEA)	[I.C.]
Portland (PRT)	[I.C.]
Phoenix (PHX)	[I.C.]

(CX's 972, pp. 58–61; 84H, F, G, 973, p. 118; 80F-H).

73. The warehouse space of the distribution centers focused on ranges from 28,000 sq. ft. in Salt Lake City (CX 973, p. 13) to 120,000 sq. ft. in Seattle (Tr. 5509).

74. The number of inventory turns in 1979 for Boise's distribution centers focused on in this case was: [19]

Philadelphia	– 4.9
New York	– 3.8
Boston	– 2.8
San Francisco	– 5.5
Seattle	– 5.2
Portland	– 5.1
Salt Lake City	– 4.1
Phoenix	– 3.2

The average turn for the Division was 4.6 (CX 51Z–16).

75. In 1980, for the Office Products Division as a whole, of the $138,563,478 of commercial sales, $21,349,186 or 15.4% were drop-

shipped directly from the factory to the customer, the remaining 84.6% being sold out of warehouse inventory (CX 30).

8. The Distribution Centers' Sales Forces

76. Separate sales forces call on Boise's dealer and commercial accounts. The dealer-account salespeople are paid a salary plus bonus; the commercial-account salespeople are on commission (CX's 970, pp. 15–16; 976, pp. 29–30).

77. In 1976, the Pennsauken location had five sales representatives for commercial accounts and four handling dealer accounts (CX 69U). Around 1978, Pennsauken increased its commercial-account sales force. Now Pennsauken has seven outside salespeople who call exclusively on commercial accounts in its sales office in Washington, D.C. (Tr. 5784–85).

78. In 1982, the Boston distribution center had one salesperson calling on dealers, and seven calling on commercial accounts (Tr. 4582–83).

79. Boise's Salt Lake City location has four outside sales representatives and they handle commercial accounts exclusively (Tr. 5003–04).

80. In 1978, the Seattle distribution center had nineteen commercial sales representatives and two dealer salespeople (CX 90Z–23).

81. The Portland location had one dealer sales representative and nine salespeople for commercial accounts in 1980 (CX 96D). In 1982, the commercial sales force had increased to eleven but the dealer sales force remained at one (Tr. 5389–90).

82. The San Francisco location has eighteen sales representatives calling on commercial accounts and four representatives calling on dealers (Tr. 5646–47). **[20]**

9. Boise's Services To Commercial Accounts

83. To attract business from commercial accounts, Boise distribution centers offer them attractive prices and various services. Some accounts are given better prices on frequently ordered items than are normally offered in Boise's price lists (Tr. 4869–70, 5044, 5693; CX's 60, 1368A–E; RX 216A–N).

84. In some cases, Boise uses pricing as a competitive weapon. In the 1979 Phoenix Marketing Plan, a competitive analysis of Wist Supply and Equipment Company (CX 84A–B, Z–6–Z–10) said that Wist has "the best service of anyone in the valley" and "our salespeople say the only way we have been able to take away their accounts are through lower pricing" (CX 84Z–9). To be more effective against Wist, Boise planned to:

Key on all larger accounts served by this competitor.

Offer a more competitive price to the larger accounts.

Offer a larger inventory selection to the larger accounts (CX 84Z–10).

85. Boise employees who testified in this case stated that it offers more and better services than competing dealers (Tr. 5402, 5243, 5174, 5575) and that they emphasize these services when they sell to commercial accounts (Tr. 4635–36, 4582, 5175; CX 972, p. 43). Some accounts have switched to Boise because of the services it offers (Tr. 5253–54, 5201–02, 5635).

86. The importance of service, as well as price, was summarized by Nathan Parrish, director of administrative services for Nike, Inc. (Tr. 5440), who explained what factors he considered in choosing Boise as a primary supplier for Nike:

I think generally we look at what the cost to us in doing business with the supplier is. A part of that, obviously, is the price of the products that they charge us, but also a more important part, too, is the level of service they provide to us. That is all a part of what we identify as the cost of doing business with a supplier or the cost directly to us for what he furnishes (Tr. 5444). [21]

10. Boise's Net Profits

87. Net profit is the net income that is arrived at by deducting all operating and administrative expenses from the gross profit (Tr. 4341). For the period 1976 to 1979, the net profit before taxes as a percent of sales for Boise has steadily increased:

1976	1977	1978	1979
[	I.C.		]

(CX 51Z–12).

Boise's 1979–1983 Business Plan revealed that its return on sales was comparable to the leading industrial stationers in the industry (CX 48H).

D. *The Prices Charged By Six Office Product Manufacturers To Boise And Competing Office Products Dealers And Boise's Knowledge Of Those Prices*

1. Introduction

88. To prove the complaint's allegation that Boise violated Section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving discriminations in price from its suppliers that are prohibited by Section 2(a) of the Act, complaint counsel called twenty-one dealers

and presented evidence of the prices charged to Boise and those dealers by six manufacturers.

2. Price Charts And Boise's Objections To Them

89. Complaint counsel offered, and I received in evidence, six charts (CX's 1–6) which summarize entries on invoices which reflect the discounts granted by six manufacturers of office products to Boise and to selected competing dealers; however, the invoices were not offered through a witness and Boise claims that they should not have been admitted because there was no evidence presented as to how the charts were prepared or whether the prices were representative of the prices charged to dealers. Boise also objects that only the chart for Boorum and Pease and that part of the Sheaffer Eaton chart relating to Duo-Tang products show invoice prices (RPF's 263, 265). [22]

90. In addition, Boise points out, and complaint counsel concede, that they did not, as Dr. Elzinga testified, "draw a random sample of invoices between the manufacturer and commercial stationers and a random sample of invoices between the manufacturer and the dual distributor. . . ." (Tr. 6283).

91. Boise also refers to some instances in which it discovered dealer invoice entries containing discounts equal to or greater than it received (RPF's 266–69), it argues that items which are priced on the basis of volume should not have been excluded from the charts (RPF 270) and its claims that the charts omit proof of sale of the products (RPF's 271–74). Other objections are that the charts do not establish that the purchases were reasonably contemporaneous (RPF's 275–76), that the goods sold were of like grade and quality (RPF 277) or that the discounts and prices listed included all of the discounts offered by the manufacturers (RPF 278).

92. Boise's major objection to the charts seems to be that they were not offered through a witness. A witness would have been superfluous after the extensive pre-trial discovery Boise had, for it was given copies of all six manufacturers' invoices, and complaint counsel's charts were corrected when errors were discovered. Sample invoices were also received in evidence so that the chart entries could be understood, and a representative from each of the manufacturers testified and was cross-examined by Boise's attorneys.

93. Boise's other objections are not well-founded. The Robinson-Patman Act does not require random selection of manufacturers or their invoices. Many invoices do not show price because the manufacturers' net prices are computed by applying a standard discount from suggested list price. The difference in discounts as between Boise and a competing dealer is thus as revealing and as probative of a price difference as are actual invoiced net prices. The charts do not analyze

the manufacturers' volume prices because these prices are not challenged by complaint counsel (CRB, p. 6).

94. Contrary to Boise's claim, invoiced prices (or discounts) do reveal the price which a customer paid for a manufacturer's products:

JUDGE PARKER: What does the invoice mean? That the product was shipped?
THE WITNESS: That is a bill, an invoice rendered.
JUDGE PARKER: It means the product was actually shipped to the customer? [23]
THE WITNESS: Yes, sir, from that we expect a payment from that piece of paper (Tr. 1266).

Mr. Williams of Bates also confirmed the obvious:

Q. Here is another strange question for you: I am compelled to ask you this, so forgive me. In the normal course of business what happens when a customer receives an invoice? Does the customer pay the amount on the invoice to Bates?
A. Yes (Tr. 2289–90).

95. After extensive discovery, Boise was able to find a few instances in which manufacturers may have favored the selected dealers over Boise or may have charged Boise and a dealer the same price (RPF's 266–69), but this occurred on less than a dozen invoices (CRB, pp. 36–37); complaint counsel have established, on the other hand, that in thousands of cases in 1979,[2] Boise was consistently favored over the selected dealers on goods of like grade and quality. The only possible conclusion is that the charts accurately reflect the prices charged, or discounts given, by the six manufacturers to Boise and the selected dealers in 1979.

3. The Selected Dealers Compete With Boise

96. For each of the following dealers, all of whom are listed in the price charts, Boise admits that: (1) it solicited end-user accounts which at the same time were being served in whole or in part by the dealer; (2) it obtained end-user accounts which were served before in whole or in part by the dealer; and (3) it sold office supplies in competition with the dealer:

Union Office Supply, Boston, Mass.
G.E. Stimpson Co., Worcester, Mass.
Monroe-Narcus Stationers, Brighton, Mass.
David Appel, Paterson, N.J. **[24]**
A. Pomerantz & Co., Philadelphia, Pa.
Yorkship Business Supply, Cherry Hill, N.J.
Hugh A. George Co., Wilmington, Del.
George D. Hanby Co., Wilmington, Del.

[2] There are over 5,800 entries on CX's 1–6. Over 4,500 of them reflect sales where both the sale to Boise and the compared sale to a competing dealer crossed state lines (CX's 1–6).

Andrews Office Products, Washington, D.C.
Associated Ruggles, Seattle, Wash.
John L. Bird Co., Seattle, Wash.
The Stationers, Tacoma, Wash.
Trick & Murray, Seattle, Wash.
Dean Mark, Fremont, Cal.
Gilbert-Clarke, San Francisco, Cal.
Curtis Lindsay, Inc., Santa Clara, Cal.
Charlie Helwig, Inc., Portland, Ore.
Kilham Stationery & Printing, Portland, Ore.
Klip Stationers, Portland, Ore.
Kelly Co., Salt Lake City, Utah
Mid-West Office Furniture and Suppliers, Salt Lake City, Utah
Weber Office Supply, Salt Lake City, Utah
Wist Supply and Equipment Co., Phoenix, Ariz.

(CX 431S–Z–3, Requests 132–34, 136–55, 159–61, 163–82, 186–88, 190–209; Order Ruling on Complaint Counsel's Motion to Determine the Sufficiency of Boise Cascade's Answers to Requests for Admissions, April 12, 1982).

97. Twenty of the dealers who testified indicated who they considered to be their primary competitors. (Weber Office Supply was not asked to do so.) The dealers generally listed two to six competitors and nineteen of the twenty included Boise among the competitors they named (Kilham testified it competed with all dealers, including Boise, but did not categorize which ones were primary competitors) (Tr. 3662, 3664–65, 3144, 4081, 3424–25, 3556, 3240, 3359, 3327, 3897, 4217, 3034, 3980, 2605–06, 656, 1341, 2533–34, 2037, 2431, 2913; CX 702, Exhibit 3, p. 5).

98. The Boise distribution center managers named each of the dealers who testified as competitors, with the exception of Union, The Stationers and Gilbert-Clarke (Tr. 5611, 4962–63, 4577; CX's 977, pp. 89–90; 972, pp. 77, 91; 976, p. 145; 974, pp. 105–06; 973, pp. 20–21; 975, pp. 11–13).

99. The Boise distribution centers' Marketing Plans analyze major competitors. Among the dealers analyzed in those plans are Curtis Lindsay (CX 99F), Pomerantz (CX 70Z–3–Z–7), G.E. Stimpson (CX's 75Z–3–Z–8, 74Z–7–Z–11), Ruggles (CX's 90U, 91Z–2), Trick & Murray (CX's 90Z–6, 91M), Wist (CX 85V), Mid–West (CX 79F), Kelly (CX 79F), and Weber (CX 79G).

100. Boise distribution centers' Marketing Plans list Key Target Accounts. The current supplier of the target account is included on the form. Among the dealers who were current suppliers of key target accounts are Klip (CX 95Z–10), Pomerantz [25] (CX 70Z–60), Andrews (CX 70Z–61), Monroe (CX 75Z–18–Z–21), Kelly (CX's 80Z–26, Z–30, Z–31, Z–34, 81Z–36–Z–37), Weber (CX's 80Z–30, Z–33, 81Z–36, Z–39),

Wist (CX 85Z–11), Trick & Murray (CX's 90Z–29, 91Z–54), and Ruggles (CX 91Z–54).

4. Rediform Office Products

a. *Description*

101. Rediform Office Products ("Rediform") is a division of Moore Business Forms, Inc. and has been located in Paramus, New Jersey, for thirteen or fourteen years (Tr. 756–57). It sells stock business forms, related business forms, and recordkeeping devices (Tr. 757).

102. Rediform's sales were approximately $18 million in 1979 and $23 million in 1981 (Tr. 762, 764). In 1979, 48% of its sales were to retail dealers and 52% were to wholesalers (Tr. 766).

b. *Products*

103. Rediform classifies its stock business forms in nine groups which correspond to the business functions for which they are used: purchasing, receiving, stockkeeping, production, selling, delivery, billing, collecting and disbursing (Tr. 768, 1019; CX 400, p. 3).

104. Rediform's business forms come in several types. For instance, a Rediform Speediset is a complete set of forms with copies and carbon held together in a single unit by a firmly posted perforated stub which is for one-time use. Another example is book forms, which have numbered sets of forms in a book with reusable carbon for copies (Tr. 768–69; CX 400, p. 4).

105. Rediform also sells form-handling equipment and autographic registers. Each of these constitutes less than 1% of its sales (Tr. 800–01).

106. Recordplate is another major line produced by Rediform which includes recordkeeping diaries, appointment books and loose-leaf products (Tr. 757–58).

107. There are no differences between the products sold by Rediform to Boise and those sold to dealers. They are packaged the same way, sold under the same label, and used for the same purpose (Tr. 769–73, 787–88, 845–46, 855). **[26]**

c. *Sales In Commerce*

108. Rediform produces Recordplate products in a manufacturing facility in El Monte, California, and it operates three distribution facilities located in Paramus, New Jersey; St. Louis, Missouri; and Los Angeles, California. These distribution centers house inventory and ship orders to customers (Tr. 833, 855).

109. The Paramus distribution facility serves the eastern United States from Cleveland east, including New Jersey, Pennsylvania and

Massachusetts. The Los Angeles facility serves the eleven western states, including California, Washington, Oregon, Arizona and Utah (Tr. 883–86).

110. Rediform's distribution centers obtain business forms from factories operated by Moore in the United States (Tr. 885). They generally order from Moore plants four times a year, or more often for fast-moving goods (Tr. 894–96).

111. In 1979, Rediform's Paramus distribution center obtained stock business forms from Moore plants at the following locations: Elmira, New York; Lewisburg, Pennsylvania; Rochester, Indiana; Marion, Kentucky; and Honesdale, Pennsylvania (Tr. 886–87).

112. In 1979, the Los Angeles distribution center of Rediform obtained Speedisets from Moore plants in Salem, Oregon; Logan, Utah; Lewisburg, Pennsylvania; and Rochester, Indiana (Tr. 891; CX 410A).

113. In 1979, Rediform's distribution centers obtained Recordplate products from the plant in El Monte, California (Tr. 885–86, 855).

d. *Sales Policy*

114. The suggested list prices published by Rediform reflect different prices for different quantities. The higher the quantity, the lower the price per unit (Tr. 792–93, 820–21; CX's 225, 203).

115. Retail dealers have received a 50% discount off suggested list price on Rediform business forms since 1956 (Tr. 790–91, 793–94, 798–99, 803–04, 807, 828; CX's 197, 206–10).

116. Wholesalers have received a 50–20% discount off suggested list price on Rediform business forms since about the late 1950's (Tr. 816–17, 820–21, 827–28; CX's 204–05, 196). Boise and its predecessor have received this 50–20% discount on [**27**] Rediform business forms since the late 1950's or early 1960's (Tr. 843–44).

117. Retail dealers have received a 50% discount off suggested list price from Rediform on Recordplate since September 26, 1977 (Tr. 808–09; CX 214–18), while Boise has received a 50–20% discount from Rediform on these products since late 1977 (Tr. 817–18, 843–44).

118. Rediform pays the freight for all wholesalers and dealers, except on purchases of certain minor products in which case the customer pays the freight (Tr. 907).

119. Rediform's payment terms have always been the same for all customers (Tr. 908).

e. *Examples Of Discriminatory Sales*

(1) Billing Forms

120. CX 4 identifies billing forms sold to dealers and competing Boise distribution centers by Rediform (CX 4A, Amended L, M, N,

Revised Z–5, Z–6, Z–7, Amended Z–18, Z–19, Z–24, Z–25, Revised Z–38). The billing forms are identified by descriptions of discrete subsets of the billing forms line which have similar characteristics. For instance, "Invoice Books, 5½ × 7⅞" are identified (CX 4A, Amended L, M, N, Revised Z–5, Z–7, Z–24, Z–25, Revised Z–38). There are four invoice books meeting that description. All of them have the same format. They differ only in the number of copies per numbered form (CX's 400, p. 2; 225J, 203, p. 10). Another example is "Speediset Invoices, Ruled, 8½ × 11" (CX 4A, Amended L, M, Z–6, Z–7, Z–24, Z–25). There are two speedisets meeting this description, differing only as to the number of copies per set (CX's 400, p. 56; 255J, 203, p. 10).

121. During 1979, Stimpson, Monroe-Narcus, Pomerantz, Yorkship, Hanby, Ruggles, John L. Bird, The Stationers, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, Kilham, and Wist purchased billing forms of one or more of the following types from Rediform at a discount of 50%:

Invoice books, 5½ × 7⅞
Invoice books, 7 × 8½
Invoice books, 8½ × 11
Credit memo books
Speedipak invoices, ruled, 8½ × 7
Speedipak invoices, ruled, 8½ × 11
Speedipak invoices, unruled, 8½ × 7
Speediset invoices, ruled, 8½ × 7
Speediset invoices, ruled, 8½ × 11 **[28]**
Speediset invoices, unruled, 8½ × 7
Speediset invoices, unruled, 8½ × 11

(CX 4A, Amended L, M, N, Revised Z–5, Z–6, Z–7, Amended Z–18, Z–19, Revised Z–38).

122. During 1979, Boise's distribution centers which competed with the dealers identified in F. 121 purchased the same types of billing forms as did those dealers at a discount of 50–20% (CX 4A, Amended L, M, Revised Z–5, Z–6, Amended Z–18, Z–24, Revised Z–38).

(2) Producing Forms

123. CX 4 identifies producing forms sold to dealers and competing Boise distribution centers (CX 4J, K, Z–3, Z–3.1, Z–4, Revised Z–16, Z–17, Z–17.1, Z–46). The producing forms are unique in many instances, for example, weekly time tickets; Speediset, Speedimemo, unruled 8½ × 7; and Speediset, Rediletter, unruled 8½ × 7 (CX 4J, K, Z–3.1, Z–4, Revised Z–16, Z–17.1). Each of these products comes in only one version (CX's 225D, 203, pp. 4, 5, 14; 225E, N). Other producing forms are identified by descriptions of discrete subsets of the producing-forms line that have similar characteristics, such as

"Speedisets, Speedimemo, Ruled 8½ × 7" (CX 4Z–3.1, Z–4, Revised Z–16, Z–17, Z–17.1). This product comes in four versions which differ only in format and as to whether the copies are made with carbon paper or carbonless paper (CX's 400, pp. 21–22; 225E, 203, p. 5).

124. During 1979, Pomerantz, Yorkship, Hugh George, George Hanby, Andrews, Ruggles, John L. Bird, The Stationers, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, and Appel purchased producing forms of one or more of the following types from Rediform at a discount of 50%:

Weekly time tickets
Speediset, Speedimemo, ruled 5½ × 8½
Speediset, Speedimemo, ruled, 8½ × 7
Speediset, Speedimemo, unruled 8½ × 7
Speediset, Speedimemo, ruled 8½ × 11
Speediset, Rediletter, ruled 8½ × 7
Speediset, Rediletter, unruled 8½ × 7
Auto repair inspection report
Auto repair orders, 8½ × 8½
Speedicopy pads, 8½ × 11
Envelopes, double-window

(CX 4J, K, Z–3, Z–3.1, Z–4, Revised Z–16, Z–17, Z–17.1, Z–46). [29]

125. During 1979, Boise's distribution centers which competed with the dealers identified in F. 124 purchased the same types of producing forms as did those dealers at a discount of 50–20% (CX 4J, Z–3, Z–3.1, Z–16, Z–46).

(3) Selling Forms

126. CX 4 identifies selling forms sold to dealers and competing Boise distribution centers (CX 4D, E, F, Amended Q, Amended R, S, T, Z–10, Z–11, Z–12, Z–27, Z–28, Z–29, Z–40, Z–41, Z–49). The selling forms are identified by descriptions of discrete subsets of the selling-forms line which have similar characteristics. For instance, "Sales Books, 3⅝ × 6⅜," is listed (CX 4D, F, Amended Q, Amended R, S, T, Z–10, Z–11, Z–27, Z–29, Z–40, Z–49). This product comes in two versions, duplicate and triplicate (CX's 400, p. 34; 225G, 203, p. 7).

127. During 1979, Stimpson, Monroe-Narcus, Yorkship, Hugh A. George, George D. Hanby, Andrews, Ruggles, John L. Bird, The Stationers and Trick & Murray purchased selling forms of one or more of the following types from Rediform at a discount of 50%:

Sales books, 3⅝ × 6
Sales books, 3⅝ × 6⅜
Sales books, 4¼ × 6⅜
Sales books, 4¼ × 7⅞

Sales books, 5½ × 7⅞
Sales form books
Salesman's order book, 4¼ × 6⅜
Salesman's order book, 5½ × 7⅞
Salesman's order book, 8½ × 11
Continuous register sales forms
Speediset, sales forms, 5½ × 8½

(CX 4D, E, F, Amended Q, Amended R, S, T, Z–10, Z–11, Z–12, Z–40, Z–41).

128. During 1979, Boise's distribution centers which competed with the dealers identified in F. 127 purchased the same types of selling forms as did those dealers at a discount of 50–20% (CX 4D, Amended Q, Amended R, Z–10, Z–11, Z–40, Z–41).

(4) Delivery Forms

129. CX 4 identifies delivery forms sold to dealers and competing Boise distribution centers by Rediform (CX 4B, Revised [30] C, Amended O, P, Z–8, Z–9, Z–20, Z–21, Z–26, Z–34, Z–39, Z–48). The delivery forms are identified by descriptions of discrete subsets of the delivery-forms line. For instance, "Speediset Short Form, B/L" is listed (CX 4B, Revised C, Amended O–P, Z–8–Z–9, Z–20–Z–21, Z–26, Z–48). This product comes in two versions, triplicate and quadruplicate (CX's 400, p. 50; 225I, 203, p. 9).

130. During 1979, Stimpson, Monroe-Narcus, Pomerantz, George D. Hanby, Yorkship and Wist purchased delivery forms of one or more of the following types from Rediform at a discount of 50%:

Speediset short form, b/1
Speedipak short form, b/1
Call notice
Packing slips
Driver's daily log
Delivery receipts
Railroad b/1
Speediset motor carrier, b/1
Meter check
Speediset Canadian Customs Inventory
Driver's daily log

(CX 4B, Revised C, Amended O, P. Z–8–Z–9, Z–20–Z–21, Z–26, Z–34, Z–39, Z–48).

131. During 1979, Boise's distribution centers which competed with the dealers identified in F. 130 purchased the same types of delivery forms as did those dealers at a discount of 50–20% (CX 4B, Amended O, Z–8, Z–9, Z–20, Z–26, Z–34, Z–39, Z–48).

(5) Purchasing Forms

132. CX 4 identifies purchasing forms sold to dealers and competing Boise distribution centers (CX 4G, H, I, Amended U, Amended V, W, X, Z–13–Z–15, Z–22, Z–23, Z–30–Z–31, Z–42–Z–43, Z–50). The purchasing forms are identified by descriptions of discrete subsets of the purchasing-forms line which have similar characteristics. For instance, "Material Requisitions" is listed (CX 4G, I, Amended U, W, Z–13–Z–14). This product comes in two versions, duplicate and triplicate (CX's 400, p. 5; 225B, 203, p. 2).

133. During 1979, Union, Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Hanby, Ruggles, Trick & Murray, Dean Mark, Gilbert-Clarke, Curtis Lindsay, Wist and Appel purchased purchasing forms of one or more of the following types from Rediform at a discount of 50%: [31]

Material requisitions
Purchasing requisitions
Parts/material requisitions
Purchase orders, 4¼ × 6⅜
Purchase orders, 5½ × 7⅞
Purchase orders, 8½ × 11
Speedisets, ruled purchase orders, 8½ × 7
Speedisets, ruled purchase orders, 8½ × 11
Speedisets, unruled purchase orders, 8½ × 7
Speedisets, unruled purchase orders, 8½ × 11
Speedisets, requests for quotation

(CX 4G, H, I, Amended U, Amended V, W, X, Z–13–Z–15, Z–22–Z–23, Z–42–Z–43, Z–50).

134. During 1979, Boise's distribution centers which competed with the dealers identified in F. 133 purchased the same types of purchasing forms as did those dealers at a discount of 50–20% (CX 4G, Amended U, Amended V, Z–13–Z–14, Z–22, Z–30, Z–42, Z–50).

(6) Collecting Forms

135. CX 4 identifies collecting forms sold to dealers and competing Boise distribution centers. The collecting forms identified are "money receipts 4 on a page" (CX 4Z–32, Z–35, Z–44). The receipts come in five versions and vary as to size, format and number of copies (CX's 225K, 400, pp. 59, 61).

136. During 1979, Helwig, Kilham, Kelly, Mid-West, Weber and Wist purchased "money receipts 4 on a page" at a discount of 50% (CX 4Z–32, Z–35, Z–44).

137. During 1979, Boise's distribution centers which competed with

the dealers identified in F. 136 also purchased "money receipts 4 on a page" at a discount of 50–20% (CX 4Z–32, Z–35, Z–44).

138. During 1979, the dealers identified in F.'s 121, 124, 127, 130, 133, 136 paid Rediform 25% more[3] for stock business forms than did the Boise distribution centers with which those dealers competed (F.'s 120–37). [32]

(7) Recordplate

139. CX 4 identifies products in the Recordplate line sold to dealers and competing Boise distribution centers (CX 4, Amended Y, Z–1–Z–2, Z–33, Z–36–Z–37, Z–45, Revised Z–51). The products are unique in many instances, for example, address forms, 2½ × 5; address forms, 2½ × 3⅞; address-o-ref forms, 2½ × 5; address-o-ref forms, 2½ × 3⅞; and faint-ruled sheets, 8 × 5 (CX 4, Amended Y, Z–1–Z–2, Z–33, Z–36–Z–37, Z–45). Each of these products comes in only one version, excluding differences in color (CX's 192J, pp. 3, 8; 223B, 224B). Other Recordplate products are identified by descriptions of discrete subsets of the Recordplate line which have very similar characteristics. For instance, "Bookset, Address, #653" is listed (CX 4, Amended Y, Z–1–Z–2, Revised Z–51). This product comes in three versions, which differ in ring capacity and in color (CX's 192J, p. 1; 223A, 224A).

140. During 1979, Pomerantz, Yorkship, Andrews, Klip, Kelly, Weber, Wist, and Appel purchased Recordplate products of one or more of the following types from Rediform at a discount of 50%:

Address forms, 2½ × 5
Address forms, 2½ × 3⅞
Address-O-Ref forms, 2½ × 5
Address-O-Ref forms, 2½ × 3⅞
Faint-ruled sheets, 8 × 5
Bookset, address, #653
Bookset, address, #613
Bookset, telephone
Sales follow-up

(CX 4, Amended Y, Z–1–Z–2, Z–33, Z–36).

141. During 1979, Boise's distribution centers which competed with the dealers identified in F. 140 purchased the same types of Recordplate products as did those dealers at a discount of 50–20% (CX 4, Amended Y, Z–1, Z–33, Z–36, Z–45, Z–51).

142. During 1979, Pomerantz, Yorkship, Andrews, Klip, Kelly, Weber, Wist and Appel paid Rediform 25% more for Recordplate

[3] For example, if a product had a suggested list price of $1.00, Boise received a 50–20% discount, thereby paying 40 cents (F. 8). The dealer received a 50% discount, thereby paying 50 cents. The difference of 10 cents, divided by 40 cents, equals 25%.

products than the Boise distribution center with which each dealer competed (F.'s 139–41).

f. *Volume Of Boise's Purchases From Rediform*

143. Rediform's sales in 1979 to selected Boise distribution centers of Rediform products and Recordplate were: [33]

	Rediform Products	Recordplate	Total
Boston	$ 5,595	$ 1,584	$ 7,179
Atlanta	22,725	7,664	30,389
Charlotte	15,580	2,098	17,678
Jacksonville	12,505	1,759	14,264
Miami	35,523	3,564	39,087
Moonachie	2,194	377	2,571
Pennsauken	33,161	3,640	36,810
Tampa	21,650	2,331	23,981
Cincinnati	54,298	5,992	60,290
Cleveland	30,172	147	30,319
Detroit	25,296	3,570	28,866
Dorsey-Dallas	11,385	2,075	13,460
Dorsey-Houston	10,299	1,269	11,568
Itasca	123,186	19,528	142,714
Milwaukee	45,403	4,042	49,445
Nashville	28,552	2,356	30,908
St. Paul	70,994	5,759	76,753
Denver	49,125	5,036	54,161
Los Angeles	27,951	6,434	34,385
Portland	20,683	1,627	22,310
Seattle	45,644	3,953	49,597
Brisbane	21,479	3,175	24,654
Phoenix	14,194	1,229	15,423

(CX 194).

144. In 1979, Boise distribution centers purchased approximately $718,402 of products from Rediform distribution facilities located in states different from those in which the Boise distribution centers were located (New Jersey, St. Louis, Los Angeles) (F.'s 108, 143).

145. Boise's total purchases from Rediform in the years indicated were:

1976	$446,746	1978	$724,173
1977	$641,457	1979	$913,501

(CX 630G).

146. Boise is one of Rediform's largest customers (Tr. 765–66). [34]

g. *Boise's Possession Of Price Information*

147. Rediform sends schedules reflecting retail dealer discounts to wholesale customers (Tr. 795, 798, 800, 803–04, 807, 809). It sent retail dealer discount schedules to Boise because it is customary to provide wholesale customers with information concerning retail dealer discounts. This is done because wholesalers sell to retailers and it is helpful to the wholesaler to know the discounts at which dealers can buy from manufacturers (Tr. 795–96).

148. Boise's files contained Rediform's retail dealer discount schedules for business forms dated July 1, 1977 to October 6, 1980. These schedules reflected the 50% dealer discount (CX's 206–10, 438A, 439B).

149. Boise's files contained retail dealer discount schedules for Recordplate dated from September 26, 1977 to October 6, 1980. These schedules reflected the 50% dealer discount (Tr. 808–09; CX's 438A, 439B, 214–18).

150. Boise's Buyers' Guides dated November 11, 1977, March 22, 1978, April 6, 1979, and September 2, 1980 show that Rediform's published discount to dealers was 50% (CX's 219–22, 438A, 439B).

151. Rediform sent an announcement to wholesalers of Recordplate that on September 26, 1977, the discount on Rediform and Recordplate lines would be the same, a 50–20% discount for wholesalers and a 50% discount for retail dealers. Boise had a copy of this announcement in its file (Tr. 824; CX's 230, 438A, 439B).

152. Boise had in its files a copy of a 1979 letter from Rediform which stated that its discount on Recordplate products to dealers was 50% (CX's 237, 438A, 439B).

153. Dennis Office Supply, acquired by Boise in 1978, had purchased products from Rediform at a discount of 50%. Boise's Boston distribution center buys at a discount of 50–20% (Tr. 830–31).

5. Sheaffer Eaton

a. *Description*

154. Sheaffer Eaton is a division of Textron (CX's 269Z–27, 270Z–24). Textron is located in Providence, Rhode Island. Sheaffer Eaton has been located in Pittsfield, Massachusetts, since 1976 (Tr. 1058–59). **[35]**

155. Within the Sheaffer Eaton Division of Textron, Sheaffer manufacturers writing instruments and Eaton includes the Duo-Tang line, At-A-Glance record books, Berkshire typewriter papers, and social stationery, among others (Tr. 1059).

156. In 1981, Sheaffer Eaton's sales of Duo-Tang were approximate-

ly $33 million and sales of At-A-Glance were approximately $25 million (Tr. 1091).

b. *Products*

157. Duo-Tang is a line of paper carriers which includes a number of variations of portfolios and covers for binding papers (Tr. 1080–81; CX 290A).

158. At-A-Glance is a record-book line which includes dated and nondated products. The dated portion of the line has three basic formats, Day At-A-Glance, Week At-A-Glance, and Month At-A-Glance. The dated portion of the line for the most part "is simply a proliferation of those formats into different configurations and sizes . . ." (Tr. 1066). The At-A-Glance books come in pocket and desk sizes (CX's 269B, 270B).

159. The nondated portion of the line includes telephone address books, auto record books, expense books and similar items (Tr. 1066).

160. The At-A-Glance line is sold to wholesalers and dealers. There are no differences between the items in the line which are sold to wholesalers and to dealers. They are packaged the same way and sold under the same label (Tr. 1074–76).

161. Duo-Tang products are sold to both wholesalers and dealers. There are no differences in the Duo-Tang products which are sold to wholesalers and to dealers (Tr. 1083–84).

162. The Duo-Tang and At-A-Glance products sold to Boise are not specifically manufactured for Boise. They are stock items (Tr. 1155).

c. *Sales In Commerce*

163. Duo-Tang products have been produced in Paw-Paw, Michigan since approximately 1945. Products are shipped directly to customers from Paw-Paw (Tr. 1079).

164. At-A-Glance products have been produced in Pittsfield, Massachusetts since 1947. At-A-Glance products are shipped directly from Pittsfield to the customer. No distribution centers are used (Tr. 1066–67). [36]

d. *Sales Policy*

165. Sheaffer Eaton has had a 50% discount for dealers on At-A-Glance for twenty-five years (Tr. 1102–03, 1058).

166. Sheaffer Eaton has given a 50–10% discount on At-A-Glance products to contract stationers since 1974 or 1975 (Tr. 1108, 1141–42; CX 262A).

167. Sheaffer Eaton has given a 50–20% discount to wholesalers on At-A-Glance since approximately 1974 or 1975 (Tr. 1126, 1112–13; CX 271A).

168. Sheaffer Eaton has given a 50% discount on Duo-Tang products to dealer customers since 1968 (Tr. 1092, 1099). On purchases of 2,500 to 4,999 units of Duo-Tang, dealers receive a discount of 50–5%. On purchases of 5,000 units or more, dealers receive a discount of 50–10% (Tr. 1128–29; CX's 244A; 289; 291A; 293A, 296A).

169. Sheaffer Eaton has given contract stationers a 50–10% discount on Duo-Tang since 1968 (Tr. 1107, 1128, 1130–32, 1136; CX's 244B, 245E).

170. Sheaffer Eaton has given wholesalers a 50–20% discount on Duo-Tang since 1968 (Tr. 1125, 1131, 1135; CX's 244B, 245A, 297). This discount was inherited from a predecessor company, Ellingsworth (Tr. 1125–26, 1138; CX 672, p. 146).

171. Sheaffer Eaton classifies Boise as a wholesaler for purchases of At-A-Glance and Duo-Tang products, and Boise has received a 50–20% discount from Sheaffer Eaton as long as James Golden, a twenty-five year employee of Sheaffer Eaton, has known Boise (Tr. 1128, 1058).

172. In order for a customer to qualify as a contract stationer, it must have bought $5,000 net of combined Duo-Tang, At-A-Glance and Berkshire products the preceding year. The customer must also buy in large quantities and bid for large consumer office supply needs. Before a contract stationer discount was extended by Sheaffer Eaton, the customer had to have a completed qualification sheet approved by regional and national management of the division (Tr. 1104–05; CX 259E, F).

173. In 1979, freight terms were the same for all customers purchasing Duo-Tang products. Sheaffer Eaton would pay freight on orders of $400 or more (Tr. 1132; CX 244A–C).

174. In 1979, Sheaffer Eaton paid freight on purchases of $2,000 or more of At-A-Glance products by wholesalers; otherwise [37] the wholesaler paid freight (Tr. 1113; CX 271A). In 1979, dealers and contract stationers received free freight on orders of $1,600 or more. On orders of $500 to $1,599.99 dealers and contract stationers received partial freight and free shipment to New York City. On orders of less than $500, dealers and contract stationers paid freight (Tr. 1142; CX's 262–63).

175. Sheaffer Eaton offered the same payment terms to all purchasers of Duo-Tang and At-A-Glance products (Tr. 1129–31, 1143; CX 244A–C).

e. *Examples Of Discriminatory Sales*

(1) Duo-Tang

176. CX 5 identifies Duo-Tang products by Duo-Tang stock numbers which identify products sold by Sheaffer Eaton (Tr. 1081–83; CX 290A–K). Some of the stock-numbered products come in various colors (CX 290A–K), while others come in only one color (*e.g.*, stock numbers 55558, 55530, 55540, 50525) (CX's 290D–G, 5S, V, Z–5, Z–11, Z–20).

177. During 1979, the dealers listed below paid Sheaffer Eaton more, by the median percentages indicated, for Duo-Tang products than the Boise distribution centers with which they competed:

Union	12.5%
Yorkship	12.5%
Hugh George	25.0%
Andrews	12.5%
Pomerantz	12.5%
Curtis Lindsay	12.5%
Klip	12.5%
The Stationers	24.7%
Ruggles	25.0%
Appel	12.5%

(CX 5A–C, S–V, Z–3–Z–5, Z–11, Z–20).

178. During 1979, Boise's distribution centers competing with the dealers identified in F. 177 paid Sheaffer Eaton lower prices for Duo-Tang products identical to those purchased by the [38] dealers[4] except possibly for differences in color (CX 5A–C, S–V, Z–3–Z–5, Z–11, Z–20).

(2) At-A-Glance

179. CX 5 identifies products in Sheaffer Eaton's At-A-Glance line that are sold to dealers and competing Boise distribution centers (CX 5D–L, Amended M–N, Revised O–R, W, X–Y, Z–1–Z–2, Z–6–Z–10, Z–12–Z–14, Amended Revised Z–15, Amended Z–16–Z–19; Tr. 1074–76). The At-A-Glance products are identified by descriptions of discrete subsets of that group of products (CX 269B–J). Although individual items may vary in size, format, color and cover material, they perform the same function for the consumer (Tr. 1313, 1309; CX 269C–T).

180. For example, the pocket week appointment books which are listed (CX 5D, G, I, J, W, X, Amended Z–12, Z–14) are primarily pocket diaries or notebooks for arranging appointments. Sheaffer Eaton makes them with different covers, inserts, formats, sizes, and with or without auxiliary inserts such as memo pads and telephone and ad-

[4] In these cases, the charts reveal that both Boise and competing dealers purchased products with the same stock numbers.

dress lists. They also come in four or five colors. Regardless of these variations, they basically serve the same function for the consumer (Tr. 1307, 1309; CX 269E–G).

181. Desk week appointment books which are listed (CX 5E, G–I, K, W, Y, Amended Z–12, Amended Revised Z–15) are appointment books for desk use (Tr. 1310–11). The desk week appointment books vary in covers, insert formats, colors, sizes and auxiliary inserts such as telephone and address lists (CX 269H–J). Regardless of these variations, the desk week appointment books serve the same function for the consumer (Tr. 1312).

182. During 1979, Pomerantz, Yorkship, Hugh A. George, George D. Hanby, Andrews, Curtis Lindsay, Trick & Murray and Appel purchased dated At-A-Glance products of one or more of the following types from Sheaffer Eaton at discounts of 50% to 50–10%:

Pocket week appointment books
Pocket 2–Week appointment books
Pocket month appointment books
Desk day appointment books
Desk week appointment books
Desk month appointment books
Professional appointment books - desk day **[39]**
Professional appointment books - desk week
Academic/fiscal appointment books - desk week
Planning calendars
Leather appointment books
Refills/dated record books

(CX 5D–L, Amended M, W–Y, Z–6, Z–7, Amended Z–12–Z–14, Amended Revised Z–15, Amended Z–16–Z–17).

183. During 1979, Boise's distribution centers which competed with the dealers identified in F. 182 purchased the same types of dated At-A-Glance books and refills as did those dealers at a discount of 50–20% (CX 5D–G, W–X, Z–6, Amended Z–12–Z–14).

184. During 1979, Pomerantz, Yorkship, Hugh A. George, George D. Hanby, Andrews, Curtis Lindsay, Trick & Murray and Appel paid Sheaffer Eaton 12.5% to 25% more for dated At-A-Glance products than the Boise distribution centers with which they competed (F.'s 179–83).

185. CX 5 identifies nondated products in Sheaffer Eaton's At-A-Glance line that are sold to dealers and competing Boise distribution centers (CX 5N, Revised O–R, Revised Z–1–Z–2, Z–8–Z–10, Z–18–Z–19). The nondated products are identified by descriptions of discrete subsets of that group of products that have similar characteristics (CX 269V–Z–6). For instance, pocket telephone/address books are listed (CX 5N, Revised O, Q, Z–1, Z–8–Z–9, Z–18–Z–19). The pocket tele-

phone/address books come in eight stock number models. They vary in size, capacity, and covers. All serve as record books for names, addresses and telephone numbers (CX 269Z–3–Z–4).

186. During 1979, for nondated At-A-Glance record books and refills, Pomerantz, George D. Hanby, Curtis Lindsay, The Stationers, Trick & Murray and Appel purchased four or more of the following types from Sheaffer Eaton at discounts of 50% or 50–10%:

Pocket telephone/address books
Desk telephone/address books
Auto expense books
Expense and tax books
Guest register books
Desk week appointment books
Refills: Telephone/address
Refills: Memo pad
Refills: Expense and tax

(CX 5N, Revised O–R, Z–1–Z–2, Z–8–Z–10, Z–18–Z–19). **[40]**

187. During 1979, Boise's distribution centers which competed with the dealers identified in F. 186 purchased the same types of nondated At-A-Glance books and refills as did those dealers at a discount of 50–20% (CX 5N, Revised O, Z–1, Z–8–Z–9, Z–18).

188. During 1979, Pomerantz, George D. Hanby, Curtis Lindsay, The Stationers, Trick & Murray and Appel paid Sheaffer Eaton 12.5% to 25% more for nondated At-A-Glance books and refills than the Boise distribution centers with which they competed (F.'s 185–87).

f. *Volume Of Boise's Purchases From Sheaffer Eaton*

189. Sheaffer Eaton's sales of At-A-Glance to Boise's distribution centers in 1978 and 1979 were:

At-A-Glance Sales	1979	1978
Itasca, Illinois	$ 85,700	$ 71,573
Seattle, Washington	22,473	14,097
Cincinnati, Ohio	19,380	14,908
Warren, Michigan	21,367	20,232
Milwaukee, Wisconsin	7,552	7,880
St. Paul, Minnesota	22,222	21,446
Brisbane, California	4,286	1,796
Pennsauken, New Jersey	21,576	23,485
Compton, California	18,466	7,919
Brooklyn Heights, Ohio	0	7,659
Atlanta, Georgia	14,355	15,209
Denver, Colorado	9,991	7,515
Portland, Oregon	0	3,151
Houston, Texas	9,868	6,806
Nashville, Tennessee	0	8,639

Tampa, Florida	7,116	4,872
Charlotte, North Carolina	6,590	6,353
Miami, Florida	16,334	17,509
Moonachie, New Jersey	7,278	5,784
Burlington, Massachusetts	1,656	573
Dallas, Texas	12,604	30,514
Jacksonville, Florida	8,233	9,806
Phoenix, Arizona	188	0

(CX 279).

190. Boise's total purchases of At-A-Glance products from Sheaffer Eaton were $307,726 in 1978 and $336,854 in 1979 (CX 279). [41]

191. Sheaffer Eaton's 1979 sales of Duo-Tang to the Boise distribution centers listed below were:

Boston, Massachusetts	$21,038
Phoenix, Arizona	5,016
Portland, Oregon	33,252
Brisbane, California	70,056
Seattle, Washington	49,735
Pennsauken, New Jersey	49,611
Moonachie, New Jersey	22,017
Salt Lake City, Utah	4,753

(CX 249B).

192. Boise's total purchases of Duo-Tang products from Sheaffer Eaton in 1979 were $1,039,197 (CX 2070A).

193. Boise is one of Sheaffer Eaton's ten largest customers (Tr. 1265).

g. *Boise's Possession Of Price Information*

194. Sheaffer Eaton has given dealers a 50% discount on At-A-Glance for twenty-five years. This discount is common knowledge to wholesalers and dealers in the industry (Tr. 1102–04).

195. Boise had in its files documents reflecting dealer discounts extended by Sheaffer Eaton on Duo-Tang products dated January 17, 1977, July 3, 1978, March 19, 1979, August 15, 1979, and February 1, 1980 (CX's 289, 284, 286–87, 291, 293, 296, 438A, 439B).

196. Dennis Office Supply, acquired by Boise in 1978, had received a discount of 50% from Sheaffer Eaton on At-A-Glance and Duo-Tang products (Tr. 1159; CX 246B–L, N–P).

197. Robert Welnhofer, former General Manager of Boise's Office Products Division, knew that Sheaffer Eaton offered wholesale discounts on At-A-Glance dated products and Duo-Tang products (CX 672, p. 146). [42]

6. Kardex Systems, Inc.

a. *Identity And Business*

198. Kardex Systems, Inc. ("Kardex") is located in Marietta, Ohio (Tr. 1555). Victor Systems and Equipment is a division of Kardex which sells office products (Tr. 1520).

199. Kardex's fiscal year starts September 1 and ends August 31, In the fiscal year ending 1981, Victor's sales were approximately $13 million. In the preceding year, sales were approximately $11.5 million (Tr. 1521–22).

200. In the fiscal year ending August 31, 1980, approximately 37% of Victor's sales were to dealers and 63% were to wholesalers (Tr. 1523).

201. Victor has sold visible recordkeeping equipment and insulated files for approximately thirty years. During that time, Victor has had several corporate parents. In September 1978, Victor was divested by Sperry Univac and became "Kardex"[5] (Tr. 1529, 1531–32).

b. *Products*

202. Victor sells a visible recordkeeping line which is divided into three parts: card forms, visible record systems and visible reference equipment (Tr. 1530–31; CX's 325A, 326A, 327A).

203. Card forms are designed to hold information. They come in various sizes and have different applications (CX 327A–P; Tr. 1545). Card forms are used in conjunction with Victor's visible record systems and visible reference equipment (CX's 326D, 325D).

204. The common elements of the visible record system are card forms, visible pockets, visible signals, and pocket holders (CX 326D).

205. Cards are inserted into pockets and pockets serve as a device for holding the cards (Tr. 1545, 1549). Pocket size varies with the size of the card held (CX 326D).

206. Signals are small plastic clips which are affixed to the leading edge of a pocket to indicate certain information [43] without requiring the unleaving of the pocket (Tr. 1552; CX 326D). Signals come in various sizes and colors (CX 326"O").

207. The pockets are inserted into pocket holding devices which include cabinet slides or drawers, books units and panels (Tr. 1549; CX 326"O").

208. A book unit is a portable visible equipment device containing two panels in book form. Panels contain a series of cards in shingled fashion (Tr. 1543). Book units and panels come in a variety of sizes and capacities for holding pockets (CX 326J, M).

209. A cabinet is a complete unit containing a number of drawers

[5] The names Victor and Kardex are used interchangeably hereafter.

or slides which house cards in shingled form (Tr. 1544). Cabinets vary in the number of drawers and sizes of cards housed (CX 326F).

210. A section is an individual component of a cabinet containing one slide or drawer (Tr. 1550; CX 326H). Sections vary in size and capacity (CX 326H). A top is a section placed on top of a group of sections stacked on one another so it becomes a finished unit (Tr. 1553; CX 326H). A bottom section begins the stack (CX 326H).

211. Visible reference equipment consists of four basic elements: forms, frames, frame holding devices and bases (CX 325D).

212. Forms for reference equipment include strips, inserts, and cards (CX 325D).

213. Inserts are perforated pieces of material upon which information is placed for insertion in frames (Tr. 1546–47). Before insertion, the inserts are placed in a plastic sleeve called a "tube" (Tr. 1554). Tubes and inserts come in various sizes (CX 325I-K).

214. Strips are similar to inserts and are also inserted into frames (Tr. 1551). Information is typed on the strip for storage on the frame. Strips come in various sizes and colors (CX 325H).

215. Frames are devices designed to hold forms, and come in various sizes (CX 325D, F). Frames of a given height will fit all frame holding devices within the product lines (CX 325D).

216. Frame holding devices include, among others, desk stands (CX 325F). Desk stands vary as to the number of frames and the height of frames they accommodate (CX 325F).

217. Bases are tables upon which stands are placed (CX 325D, G). Bases come in several sizes and in two colors (CX 325G). [44]

218. Recordex is a portable piece of recordkeeping equipment (Tr. 1549). Recordex is a record folder which utilizes the pocket approach to information storage (CX 326L).

219. Victor encourages the purchase of the products in its visible line as a system rather than as individual items (CX 1023B).

220. Insulated files are file cabinets designed to protect either paper or other flammable material in the event of fire (Tr. 1555).

221. The products involved in this case are sold by Victor to both wholesalers and dealers. There are no differences in the products sold to wholesalers and dealers. They are sold under the same trade name and packaged the same way (Tr. 1542–55).

222. Boise buys stock items that are sold to other customers, including dealers; they are not specially produced for Boise (Tr. 1616).

c. *Sales In Commerce*

223. Kardex produces its visible recordkeeping line in Reno, Ohio, and its insulated file line in Marietta, Ohio. Other than its facilities in these locations, Kardex does not use any distribution facilities.

Since approximately 1975, products have been shipped directly from the manufacturing facilities to customers (Tr. 1555–56).

d. *Sales Policy*

224. Victor has given dealers a discount of 40% off list price on visible equipment and supplies since November 15, 1974 (Tr. 1563, 1568–69; CX's 305H, 304H, 328G, 307D).

225. During 1979, a dealer that agreed to buy $5,000 worth of visible equipment in a year received a 50% discount as a "key dealer" of visible equipment (Tr. 1572–73).

226. Wholesalers have received a discount of 50–10% on visible equipment and supplies since at least January 1979 (Tr. 1579, 1520; CX's 310B, 333D).

227. Prior to September 1, 1979, Victor offered discounts off the suggested list prices of insulated files. A discount of 40% was given unless the customer committed to purchase a certain number of files per year. If the customer committed to buy a certain number of files, the size of the discount was predicated [**45**] on the number of units to which the customer committed. The latter discount was known as a contract discount (Tr. 1590–91).

228. On September 1, 1979, Victor eliminated contract pricing on insulated files and changed to a discount similar to that used for visible equipment. On insulated files, Victor gave dealers a discount of 40–5%, key dealers 50%, and wholesalers 50–10% (Tr. 1593; CX's 310B, 307D, 333D).

229. In order to qualify as a key dealer of insulated files, a customer had to buy $15,000 a year of insulated files (Tr. 1597; CX 310B).

230. Boise has received a discount of 50–10% on visible equipment since January of 1979 and on insulated files since September 1, 1979 (Tr. 1579, 1616–17).

231. From July 1, 1978 to September 1, 1979, freight was prepaid for all customers on orders of $100 net (Tr. 1756–57; CX 328C). After September 1, 1979, freight was prepaid for all customers on orders of visible equipment of $100 net or more and on orders of insulated files of $700 net or more (Tr. 1754–56; CX's 307A–B, 333C).

232. Victor's payment terms on visible and insulated products in 1979 were "1%, 15 days, net 30 days" for dealers, and "1%, 10th prox., net 30 days" for wholesalers (CX's 328C, 307A, 333A). This allowed wholesalers a few more days than dealers to avail themselves of the cash discount (Tr. 1611–12).

e. *Examples Of Discriminatory Sales*

233. During 1979, Yorkship, Hanby, Ruggles, The Stationers, Trick & Murray, Mid-West, Weber, Curtis Lindsay, Charlie Helwig, Kilham

and Klip purchased one or more of the following types of visible equipment and supplies from Kardex at a discount of 40%: bases, book units, bottoms, cabinets, cards, desk stands, frames, inserts, pockets, Recordex, sections, signals, strips and tops (Tr. 4156–61; CX's 6C–D, F–G, Revised H–J, L–R, T–W, 440A, 444B–C, 445B–C).

234. During 1979, Union, Stimpson, Kelly and Pomerantz purchased one or more of the following types of visible equipment and supplies from Kardex at discounts of 40% or 50%: bases, book units, bottoms, cabinets, cards, frames, inserts, panels, pockets, Recordex, sections, strips and tops (Tr. 4156–61; CX's 6A–F, L–M, 440A, 444B–C, 445B–C).

235. During 1979, Boise's distribution centers which competed with the dealers identified in F.'s 233 and 234 purchased the same types of visible equipment and supplies from Kardex as did those dealers at a discount of 55% (*i.e.*, 50–10%) [**46**] (Tr. 4156–61; CX's 6A–D, G, Revised H, L, P–Q, T–U, 440A, 444B–C, 445B–C).

236. During 1979, Yorkship, Hanby, Ruggles, The Stationers, Trick & Murray, Mid-West, Weber, Curtis Lindsay, Charlie Helwig, Kilham and Klip paid Kardex one-third more for visible equipment and supplies than did the Boise distribution centers with which they competed (F.'s 233, 235).

237. During 1979, Union, Stimpson, Kelly and Pomerantz paid Kardex 11% to 33% more for visible equipment and supplies than did the Boise distribution centers with which they competed (F. 234–35).

f. *Volume Of Boise's Purchases From Kardex*

238. In the fiscal year ending August 31, 1980, Kardex's sales to Boise distribution centers were:

Phoenix, Arizona	$ 19,235
Tucson, Arizona	10,590
Brisbane, California	65,633
Compton, California	58,473
Denver, Colorado	47,406
Jacksonville, Florida	35,296
Miami, Florida	54,574
Tampa, Florida	42,066
Atlanta, Georgia	57,827
Itasca, Illinois	184,614
Burlington, Massachusetts	5,658
Warren, Michigan	29,104
St. Paul, Minnesota	44,682
Moonachie, New Jersey	11,029
Pennsauken, New Jersey	41,684
Charlotte, North Carolina	23,389
Brooklyn Heights, Ohio	23,565
Cincinnati, Ohio	48,631

Portland, Oregon	50,365
Nashville, Tennessee	23,510
Garland, Texas	38,195
Houston, Texas	51,984
Salt Lake City, Utah	2,206
Milwaukee, Wisconsin	28,186
Seattle, Washington	61,059

(CX 320A–B).

239. Boise's total purchases of office products from Kardex in the years indicated were: [47]

1976	$ 694,722
1977	753,815
1978	943,587
1979	1,062,222
1980	1,319,864

(CX 630G).

240. Boise is Kardex's largest customer (Tr. 1528).

g. Boise's Possession Of Price Information

241. Boise had a copy of Victor's dealer terms and discounts, dated July 1, 1978, in its files. This document stated that dealers received a 40% discount on visible equipment and supplies (CX's 328A, G, 438A, 439B).

242. Victor did not take any measure to conceal its key dealer discount. In fact, its sales representative had a mandate to circulate the information (Tr. 1698).

243. Boise had prepared a Buyers' Guide dated October 8, 1979, which reflected Victor's dealer and key dealer discounts (CX's 321A–B, 438A, 439B).

244. In a letter to Chris Milikin of Boise dated August 2, 1979, Victor announced its intention to adopt a wholesale functional discount of 50–10% on insulated files on September 1, 1979. The letter stated: "For the first time, you will have available a complete Wholesaler functional discount program" (Tr. 1598–99, 1622–24; CX's 330, 438A, 439B).

245. The 50–10% discount Victor gives to wholesalers on insulated files and visible equipment is considered a functional discount by Arthur Jones, Vice President of Marketing of Kardex. It is not available to dealers (Tr. 1599). According to Mr. Jones, informed people in the industry knew that a wholesale functional discount was not available to dealers (Tr. 1624).

7. Boorum & Pease Company

a. *Description*

246. Boorum & Pease Company ("B&P") has been in existence for over 134 years (CX 150, p. 2). Since 1975 or 1976, it has been located in Elizabeth, New Jersey (Tr. 2709). **[48]**

247. B&P's fiscal year runs from May 1st to April 30th. In the fiscal year ending April 30, 1980, its sales were approximately $70 million (Tr. 2714).

248. B&P sells data processing binders, microfilm housing ringbooks, catalog binders, sheet holders, presentation binders, ringbook sheets and indexes, binders for personal and business records, visible binders, post binders, sheets and indexes, columnar sheets, pads and accounting forms, bound books, columnar, account, cash and trial balance business records for special purposes, and marking devices (CX's 146–47).

249. In the fiscal year ending April 30, 1979, B&P made approximately 52% to 53% of its sales to wholesalers. In the following fiscal year, sales to wholesalers accounted for 55% of its sales (Tr. 2856).

b. *Products*

250. B&P sold identical products to Boise distribution centers and dealers with whom they competed during its fiscal year that ended April 30, 1980 (F.'s 251–52, 271; CX 2).

251. CX 2 summarizes some of the information contained in invoices to Boise and competing dealers (Tr. 2825–30; CX 427A–Z–28). The same B&P product number on an invoice to Boise and a competing dealer indicates that both customers purchased an identical product (Tr. 2831–32).

252. The products listed below are examples of B&P products listed in CX 2; each product number is accompanied by a short description of the product:

40652	Plastic Sorter	(CX's 2 Revised A, 150, p. 65, 427A–B)
S3562ML	Stiff Ring Binder	(CX's 2E, 150, p. 26, 427E, H)
S2556	Canvas Ring Binder	(CX's 2, Revised I, 150, p. 27, 427J, P, R)
0621 1/2 SPG	Stiff Vinyl Ring Binder	(CX's 20, 150, p. 28, 427S–T)
0122SPGR	Stiff Vinyl Ring Binder	(CX's 2W, 150, p. 29, 427U–V)
N3114	Data Binder	(CX's 2Z–1, 150, p. 18, 427W, Y) **[49]**
6559	Bound Memorandum Book	(CX's 2Z–1A, 150, p. 102, 427Z–1–Z–2)

1002	Ledger Binder	(CX's 2Z–2, 150, p. 82, 427Z–3, Z–7)
2146U	Nylon Post Binder Index	(CX's 2Z–2.1, 150, p. 24, 427Z–8–Z–9)
8821	Accountant Work Sheet Pads	(CX's 2Z–8, 150, p. 92, 427Z–10–Z–11)
216150	Bound Columnar Book	(Tr. 2840–44; CX's 2Z–10, 150, p. 98, 428)
40655	Pressboard Sorter	(CX's 2Z–11, 150, p. 65, 427Z–17–Z–18)
40654	Pressboard Sorter	(CX's 2Z–11, 150, p. 65, 427Z–19–Z–20)
212–30	Microfiche Jackets	(CX's 2Z–13, 150, p. 1, 427Z–21–Z–22)
S03523ML	Stiff Ring Binder	(CX's 2Z–17, 150, p. 26, 427Z–26, Z–28)
X188	Numbering Machine	(Tr. 2847; CX 2Z–6)

c. Sales In Commerce

253. B&P has had distribution centers located in Elizabeth, New Jersey, Kankakee, Illinois, Atlanta, Georgia, and Los Angeles, California since 1975 (Tr. 2834).

254. B&P's distribution centers serve certain geographic areas. The service area of B&P's Elizabeth location includes Boston, Massachusetts; Pennsauken and Moonachie, New Jersey; Philadelphia, Pennsylvania; and Washington, D.C. The service area of B&P's Los Angeles facility includes Seattle, Washington; Phoenix, Arizona; and San Francisco, California. Salt Lake City, Utah is served by either B&P's Los Angeles or Kankakee, Illinois, distribution center (Tr. 3836–37).

255. Shipments to customers go through the distribution centers except in emergency situations when shipments may be direct from a B&P production facility (Tr. 2835–36).

256. B&P produces its products at facilities in Syracuse and Brooklyn, New York; Elizabeth, New Jersey; Kankakee, Illinois; and Los Angeles, California (Tr. 2837–38). **[50]**

257. B&P's distribution center in Los Angeles produces heat seal products. Heat seal is a manufacturing process for vinyl ring binders. No other products were made by B&P in California. Products that are not heat sealed were necessarily produced outside of California (Tr. 2838, 2847–48).

258. Products identified in CX 2 as sold to Boise's Moonachie and Pennsauken distribution centers and compared to purchases by Appel and Yorkship, respectively, were produced outside the State of New Jersey (Tr. 2860–65).

259. Products identified in CX 2 as sold to Boise's San Francisco

distribution center and to Curtis Lindsay and Gilbert-Clarke, with the exception of heat seal products, were produced outside the State of California (Tr. 2840–50; CX 2Z–2.1, Z–3–Z–8, Revised Z–9–Z–10).

d. *Sales Policy*

260. The suggested list prices published by B&P reflect different prices for different quantities. The higher the quantity is, the lower the price per unit (Tr. 2724–26; CX 172).

261. B&P has given dealers a discount of 50% at least since 1962. The discount is applied to the suggested list price of the quantity purchased (Tr. 2729; CX's 156, 145).

262. Since at least 1962, B&P has given a discount of 50–10% to contract stationers, those accounts with an initial annual volume of $35,000 and subsequent annual volumes of $50,000 to $75,000. The discount is applied to the suggested list price of the quantity purchased (Tr. 2730–33; CX's 156, 145).

263. Wholesalers receive a discount of 50–10–5% off the lowest suggested list price regardless of quantity purchased (Tr. 2734). This discount has existed for twenty years, and Boise has received it for almost twenty years (Tr. 2709, 2734).

264. B&P also has a net pricer for wholesalers on some products. The net pricer is known as the WQPL. A WQPL price is generally lower than a price calculated with a 50–10–5% discount from suggested list (Tr. 2745). B&P did not require wholesalers to buy any special quantity to receive its WQPL price; wholesalers only had to buy B&P's products in the standard pack (Tr. 2749), just like all of its customers (CX's 146, p. 2; 147, p. 2).

265. Dealers and contract stationers paid freight on purchases from B&P, except when shipments were sent to certain geographic areas called "free delivery zones" (Tr. 2736; CX 156). [51]

266. B&P paid freight for wholesalers on purchases of 5,000 lbs. or more and on shipments to free delivery zones. On other purchases, wholesalers paid for freight (Tr. 2736; CX 156).

267. B&P's free delivery zones included the counties of Bergen, Essex, Union, Hudson, Passaic and Middlesex, New Jersey, and the cities of San Francisco and San Jose, California; Seattle, Washington; and Portland, Oregon (CX 419A–B).

268. Payment terms offered to dealers and contract stationers were identical. Wholesalers received an extra fifty or sixty days to pay (Tr. 2738–39; CX 156).

e. *Examples Of Discriminatory Sales*

269. CX 2 identifies sales of identical products to Boise distribution

centers and to dealers competing with those centers. All sales occurred within the fiscal year ending April 30, 1980 (Tr. 2714; CX 2).

270. During B&P's fiscal year ending April 30, 1980, the dealers listed below paid B&P more by the median percentages indicated than the Boise distribution centers with which they competed when purchasing identical products from B&P:

Stimpson	5.8%
Monroe-Narcus	5.9%
Pomerantz	5.3%
Yorkship	17.0%
Hugh A. George	23.8%
George D. Hanby	7.7%
Andrews	7.6%
Ruggles	17.0%
Bird	21.1%
The Stationers	22.5%
Trick & Murray	17.0%
Gilbert-Clarke	8.5%
Curtis Lindsay	17.0%
Kelly	5.8%
Mid-West	28.5%
Wist	17.3%
Appel	25.1%

(Tr. 2825–34; CX's 2, 427A–Z–28).

271. During B&P's fiscal year ending April 30, 1980, Boise's distribution centers competing with the dealers identified in F. 270 paid B&P lower prices for products identical to those purchased by the dealers (Tr. 2825–34; CX's 2, 427A–Z–28). **[52]**

f. *Volume Of Boise's Purchases From B&P*

272. B&P's sales to Boise's distribution centers were:

	Year Ending 4/30/80	Year Ending 4/30/79
Salt Lake City	$ 26,137	$ 22,264
Phoenix	8,544	2,770
Boston	18,216	8,173
Moonachie	167,476	115,498
Portland	242,283	190,676
Seattle	569,672	488,311
Pennsauken	231,745	243,096
San Francisco	457,735	363,934

(Tr. 2715–17, 2720; CX 426B, D–E, H, J, M, O, R).

273. The Seattle, Salt Lake City, Phoenix, and Boston distribution centers of Boise purchased from B&P's distribution facilities located

in states different from those in which the four Boise distribution centers were located. In the fiscal year ending April 30, 1980, the total purchases of these four distribution centers was approximately $622,569 (F.'s 253–54, 272).

274. Boise's total purchases of office products from B&P in the years indicated were:

1976	$4,141,717
1977	$4,978,933
1978	$5,396,276
1979	$6,265,349
1980	$6,734,912

(CX 630G).

275. Boise was B&P's largest customer in the fiscal year ending April 30, 1980 (Tr. 2714).

g. *Boise's Possession Of Price Information*

276. A 50% discount to dealers is a standard discount in the industry (Tr. 2729). [53]

277. A discount of 50–10% to contract stationers is well established amongst B&P and its competitors (Tr. 2732).

278. According to Robert Looney, who worked for B&P for twenty years and was its Vice President and General Sales Manager from 1972 through 1981: "It wasn't difficult to communicate the [B&P] discounts because everyone knew them, and if you didn't, you didn't belong in the business" (Tr. 2870–71, 2709).

279. Robert Welnhofer, former General Manager of Boise's Office Products Division, testified that B&P and its primary competitors had discounts of 50% for dealers, 50–10% for select dealers who bought in large volume, and approximately 50–10–5% for customers classified as wholesalers (CX 672, pp. 129, 143–44).

280. B&P sent prenotifications of price increases to wholesalers which included a printout, 941–1–AQ showing prices at 50% off list, 50–10% off list, and prices offered to wholesalers. The prenotification also included a printout, 941–1–Z, showing B&P prices at 50% off list (Tr. 2753, 2755–57, 2760–68; CX's 162, 174Z–14, Z–18). Boise received a price increase prenotification dated January 18, 1978, and it also received a printout 941–1–AQ dated December 28, 1979 (CX's 162, 174, 438A, 439B).

281. Boise's Buyers' Guides concerning B&P refer to dealer price lists (CX's 158A, 159A).

282. B&P formulated a promotional plan called the Merchandise Assistance Plan which was presented to the NOPA convention in the fall of 1978. Promotional materials were distributed to B&P's custom-

ers, including wholesalers, in 1978. The promotional material contained list prices and prices showing a 50% discount to dealers. Boise received this promotional material (Tr. 2779–81; CX's 164C–I, 438A, 439B).

8. Bates Manufacturing Company

a. *Identity And Business*

283. Bates Manufacturing Company ("Bates") has been located in Hackettstown, New Jersey, since 1921 (Tr. 2184).

284. In 1981, Bates had consolidated sales of approximately $19 million. In 1979, sales were approximately $17 million (Tr. 2189–90). [54]

285. In 1979, Bates made more than half of its sales to dealers and approximately 45% of its sales to wholesalers (Tr. 2228–29).

286. Bates produces a numbering machine line, a stapler line, a ruler line, a list finder line, a rotary file line, and an eyeleter line (Tr. 2186; CX 129R).

b. *Products*

287. In 1979, Bates offered five stock numbering machine models for sale (CX's 126A, 418A). Each Bates stock numbering machine model comes in five to seven variations. Models vary as to the number of wheels of engraved characters and the type style of the characters (CX's 126A, 418A).

288. In 1979, Bates offered numbering machine ink and inked pads in five colors (CX 126E). Inked pads fit into numbering machines to ink the wheels. Numbering machine ink is placed on the pads used in the machines (Tr. 2266–67).

289. Bates offered eleven list finder models in 1979 (CX 126F–G). Each Bates list finder model comes in two to five variations with the exception of the Model A, which comes in one version. Models vary only in color and trim (CX 126F–G). All Bates list finders serve the same function, which is to act as a repository for telephone numbers and addresses (Tr. 4835; CX 129N-O).

290. An eyeleter is a device that punctures paper and puts a small round brass eyelet in the paper which binds it together. Bates made only two types of eyeleters in 1979 (Tr. 2268; CX 126E). Bates sold eyelets in three sizes in 1979 (CX 126E).

291. There is no difference in the quality of list finders, list finder refills, stock numbering machines, numbering machine ink, inked pads, eyeleters and eyelets that are sold by Bates to dealers and wholesalers, including Boise (Tr. 2251–52, 2254–55, 2264–69).

c. *Sales In Commerce*

292. Bates produces its products in Hackettstown, New Jersey, except for two telephone list finders that are produced in Japan, and ships those products directly from Hackettstown to its customers (Tr. 2189). **[55]**

d. *Sales Policy*

293. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all list finders to dealers purchasing the quantities indicated:

1–35	40%
36–71	40–5%
72–143	40–10%
144 or more	50%

(Tr. 2203–04, 2206; CX's 125A, G, 126A, G, 130A, G, 131A, G, 132A, H, 418A, G).

294. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all list finder refills to dealers purchasing the quantities indicated:

12–71	40%
72 or more	50%

(Tr. 2204, 2206; CX's 125G, 126G, 130G, 131G, 132H, 418G).

295. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all stock numbering machines to dealers purchasing the quantities indicated:

1	30%
2–11	33&1/3%
12–35	33&1/3–5%
36 or more	40%

(Tr. 2204, 2206; CX's 125A, 126A, 130A, 131A, 132A, 418A).

296. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all numbering machine ink to dealers purchasing the quantities indicated:

1 dozen 1 oz. or 2 oz. bottles	40%
2 dozen 1 oz. or 2 oz. bottles and quarts	50% **[56]**

(Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

297. From March 21, 1977 to July 1, 1980, Bates gave dealers a discount of 50% off the list prices of all numbering machine inked pads (Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

298. From March 21, 1977 to July 1, 1980, Bates gave the following discounts off list prices of all eyeleters to dealers purchasing the quantities indicated:

1–5	40%
6–11	40–5%
12–35	40–10%
36 or more	50%

(Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

299. From March 21, 1977 to July 1, 1980, Bates gave dealers a discount of 40% off the list prices of all eyelets (Tr. 2204, 2206; CX's 125E, 126E, 130E, 131E, 132E, 418E).

300. Bates gave wholesalers the discounts indicated on the products listed below:

list finders	50–10%
list finder refills	50–10%
stock numbering machines	40–5%
numbering machine ink	50–10%
numbering machine inked pads	50–10%
eyeleters	50%
eyelets	50–10%

(Tr. 2215, 2217; CX 128A).

301. Bates also extended the equivalent of its wholesale discount to certain large contract stationers, such as New Jersey Office Supply, Eastman's, M.S. Ginn, Publix and Ivan Allen (Tr. 2216, 2226). None of the dealers selected for this case received the equivalent of Bates' wholesale discount (CX 1).

302. Bates has had its wholesale discounts since the 1940's (Tr. 2324), and Boise has been receiving that discount from Bates as long as it has been a customer (Tr. 2218).

303. Bates did not apply equal freight terms to dealers and wholesalers. Wholesalers received free freight on orders of 500 [57] lbs. or more to locations in California, Oregon, and Washington, and on orders of 200 lbs. or more elsewhere. Otherwise, a wholesaler paid for freight on an order. Dealers always paid freight (Tr. 2276–78).

304. All of Bates' customers were offered the same payment terms (Tr. 2219–20).

e. *Examples Of Discriminatory Sales*

(1) List Finders

305. During 1979, the dealers listed below purchased one to nine of the same model list finders as the Boise distribution centers with which they competed at the discounts indicated:

Union	50%
G.E. Stimpson	40–10%, and 50%
Monroe-Narcus	40–5%, 40–10%, and 50%
Pomerantz	40%, 40–5%, 40–10%, and 50%
Hugh A. George	40% and 40–10%
George Hanby	40–5%
Andrews	40–10% and 50%
Dean Mark	50–5%
Klip	50%
Mid-West	40%, 40–5%, 40–10%, and 50%

(Tr. 4156–61; CX's 1B–D, P–R, Z–3, Z–9–Z–10, Z–17, 440A, 444B–C, 445B–C).

306. During 1979, Boise's distribution centers competing with dealers identified in F. 305 purchased Bates list finders at a discount of 50–10% (Tr. 4156–61; CX's 1A–B, N–P, Z–1–Z–2, Z–8–Z–9, Z–16–Z–17, 440A, 444B–C, 445B–C).

307. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George Hanby, Andrews, Dean Mark, Klip and Mid-West paid Bates from 5.5% to 33% more for list finders than the Boise distribution centers with which they competed (F.'s 305–06).

(2) List Finder Refills

308. During 1979, the dealers listed below purchased three or more identical types of list finder refills as the Boise distribution centers with which they competed at the discounts indicated: [58]

Union	50%
G.E. Stimpson	40% and 50%
Monroe-Narcus	40% and 50%
Pomerantz	40%
Hugh A. George	40%
Andrews	50%
Dean Mark	50–5%
Klip	40% and 50%
Mid-West	40% and 50%

(Tr. 4156–61; CX's 1E–F, S–T, Z–5, Z–11, Z–18, 440A, 444B–C, 445B–C).

309. During 1979, Boise's distribution centers that competed with the dealers identified in F. 308 purchased Bates list finder refills at

a discount of 50–10% (Tr. 4156–61; CX's 1E, S, Z–4, Z–11, Z–18, 440A, 444B–C, 445B–C).

310. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Andrews, Dean Mark, Klip and Mid-West paid Bates from 5.5% to 33% more for list finder refills than the Boise distribution centers with which they competed (F.'s 308–09).

(3) Stock Numbering Machines

311. During 1979, the dealers listed below purchased one to three of the same model stock numbering machines as the Boise distribution centers with which they competed at the discounts indicated:

Union	33% and 40%
G.E. Stimpson	40%
Monroe-Narcus	30% and 33%
Pomerantz	40%
Hugh A. George	30% and 33%
Andrews	33–5%
Klip	30% and 33%
Dean Mark	30%
Trick & Murray	33–5% and 33–5–5%
Wist	33%

(Tr. 4156–61; CX's 1G–H, U–V, Z–6, Z–12, Z–14, Z–20, 440A, 444B–C, 445B–C).

312. During 1979, Boise's distribution centers that competed with the dealers identified in F. 311 purchased stock **[59]** numbering machines at a discount of 40–5% (Tr. 4156–61; CX's 1G, U, Z–6, Z–12, Z–14, Z–20, 440A, 444B–C, 445B–C).

313. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, Andrews, Dean Mark, Klip, Trick & Murray, and Wist paid Bates from 5.3% to 22.8% more for stock numbering machines than the Boise distribution centers with which they competed (F.'s 311–12).

(4) Inked Pads

314. During 1979, the following dealers purchases, at a discount of 50%, inked pads of the same color as the Boise distribution centers with which they competed: Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George D. Hanby, Andrews, Dean Mark, Klip, Trick & Murray, and Mid-West (Tr. 4156–61; CX's 1I–J, W–X, Z–7, Z–13, Z–15, Z–19, 440A, 444B–C, 445B–C).

315. During 1979, Boise's distribution centers that competed with the dealers identified in F. 314 purchased inked pads at a discount of

50–10% or 50–10–5% (Tr. 4156–61; CX's 1G, I, W, Z–7, Z–13, Z–15, Z–19, 440A, 444B–C, 445B–C).

316. During 1979, Union, G.E. Stimpson, Monroe-Narcus, Pomerantz, Hugh A. George, George Hanby, Andrews, Dean Mark, Klip, Trick & Murray and Mid-West paid Bates from 11.1% to 17% more for inked pads than the Boise distribution centers with which they competed (F.'s 314–15).

(5) Numbering Machine Ink

317. During 1979, Union, Monroe-Narcus and G.E. Stimpson purchased, at discounts of 40% and 50%, numbering machine ink, which Boise's Boston distribution center also purchased (Tr. 4156–61; CX's 1K, 440A, 444B–C, 445B–C).

318. During 1979, Boise's Boston distribution center purchased numbering machine ink at a discount of 50–10% (Tr. 4156–61; CX's 1K, 440A, 444B–C, 445B–C).

319. During 1979, Union, Monroe-Narcus and G.E. Stimpson paid Bates from 11.1% to 33.3% more for numbering machine ink than the Boise distribution center with which they competed (F.'s 317–18). **[60]**

(6) Eyelets

320. During 1979, Union, G.E. Stimpson, Pomerantz and Andrews purchased, at a discount of 40%, the same size eyelets as the Boise distribution centers with which they competed (Tr. 4156–61; CX's 1M, Y, 440A, 444B-C, 445B-C, 126E).

321. During 1979, the Boise distribution centers competing with the dealers identified in F. 320 purchased eyelets at a discount of 50–10% (Tr. 4156–61; CX's 1M, Y, 440A, 444B-C, 445B-C).

322. During 1979, Union, G.E. Stimpson, Pomerantz and Andrews paid Bates 33.3% more for eyelets than the Boise distribution centers with which they competed (F.'s 320–21).

f. *Volume Of Boise's Purchases From Bates*

323. In 1979, Bates' sales to individual Boise distribution centers were:

Location	1979 Sales
Rancho Dominquez, CA (Los Angeles)	$ 27,161.39
Portland, OR	18,816.85
Seattle, WA	56,706.43
Phoenix, AZ	6,063.24
Tucson, AZ	5,300.12
Denver, CO	30,446.37
Salt Lake City, UT	3,667.65
Atlanta, GA	23,250.49

Hialeah, FL	—
Tampa, FL	17,807.88
Miami, FL	16,967.73
Jacksonville, FL	9,710.18
Nashville, TN	26,576.57
Garland, TX	11,837.19
Houston, TX	57,507.53
Charlotte, NC	20,329.34
Brisbane, CA (San Francisco)	22,455.74
Burlington, MA (Boston)	7,030.99
Pennsauken, NJ	26,298.23
Moonachie, NJ	10,034.61
St. Paul, MN	32,735.97
Cincinnati, OH	31,121.57
Warren, MI	23,186.08
Brooklyn Heights, OH	17,698.75
Milwaukee, WI	21,437.94
Itasca, IL (Chicago)	115,408.25

(CX 456A). **[61]**

324. Boise's total purchases of office products from Bates in the years indicated were:

1976	$402,432
1977	460,896
1978	598,900
1979	665,158
1980	626,801

(CX 630G).

325. Boise is one of Bates' larger customers (Tr. 2190).

g. *Boise's Possession Of Price Information*

326. Bates' dealer price lists contain trade discounts which are given to dealers. Dealer price lists are sent to all customers of Bates, including wholesalers (Tr. 2204). Bates' dealer price lists dated March 21, 1977, August 16, 1977, April 17, 1978, December 28, 1978, and July 1, 1980, were contained in Boise's files (CX's 125–26, 130–32, 438A, 439B).

327. Bates' personnel also proposed that Boise catalog Bates' steel rule line; they discussed this with Craig Hajduk of Boise and at one point mentioned that Boise's cost would be lower than dealers' costs would be whenever dealers purchased directly from Bates (CX 971, pp. 50–51).

9. Master Products Manufacturing Co.

a. *Description*

328. Master Products Manufacturing Co. ("Master Products") has been located in Los Angeles, California, for over forty years (Tr. 1885).

329. In 1979, Master Products made about $3.6 million in sales to the office products industry. In 1981, sales were slightly over $4 million (Tr. 1890).

b. *Products*

330. Products sold by Master Products fall into four basic categories: visible sectional filing equipment, index guides, paper punches, and sales cases (Tr. 1885–86). **[62]**

331. Visible sectional filing is Master Products' main line; it is used for filing loose-leaf material (Tr. 1887, 1893). The heart of the visible sectional filing system is the base which is a receptacle for the insertion of sections. Sections are designed to hold loose-leaf paper or small catalogs (Tr. 1941).

332. Master Products also produces cabinets which are the same thing as bases except they can accommodate more sections than bases (Tr. 1949; CX 184C-D, H).

333. Sections are of three basic types: ring, multi-post, and bar. Ring and post sections are designed to hold loose-leaf material. Bar sections are used to accommodate bound references such as catalogs that cannot be conveniently punched with holes (Tr. 1954–55, 1958, 1967–68; CX 184F).

334. Ring sections are produced in one-inch capacity and double capacity. Six models of each capacity are produced. They vary in the number of rings—from two to seven—and the spacing of the rings (CX 184F-G). The multi-post sections are also produced in two types, one-inch single capacity and a double capacity. Fourteen models of each capacity are produced. They vary in the number of posts, post diameter, and spacing of posts (CX's 184G, 187A). Bar sections are produced in two versions, one single capacity and one double capacity (CX 184F). Sections are interchangeable with all of Master Products' sectional filing equipment (CX 184F, P).

335. Bases sold by Master Products vary in the number of sections they hold and their reading angle (CX 184C, H). Some bases allow for the addition of extensions which increase the capacity of the base (Tr. 1966; CX 184C). Extensions come in only two versions, each having a different reading angle (CX 184C, H).

336. Master Products also produces accessories for its visible sectional filing equipment, for instance, turntables which permit the

filing equipment to be swivelled 360 degrees (Tr. 1967). Turntables come in only one version (CX 184E).

337. The indexing Master Products sells was designed as an integral part of the visible sectional filing and is primarily purchased by customers for use with visible sectional filing (Tr. 1891).

338. Indexing sold by Master Products comes in two types: slip-lok tabs and alphabetical perma-seal tabs. A tab is a metal device riveted to an index guide which is made either of vinyl or pressed paper. Slip-lok tabs allow the user to type information on a piece of paper which is placed in the window of the tab for indexing purposes. Slip-lok tabs vary in window size. Alphabetical perma-seal tabs are permanently sealed with letters [63] of the alphabet appearing in them. Models vary as to the number of divisions of the alphabet (Tr. 1962–63; CX 184K, L).

339. Master Products produces several types of paper punches. Generally, each type is designated by a series number, such as "25 series," "33 series," "1,000 series," or "5,000 series." With the exception of the "33 series" punch which comes in only one version, punch series vary as to the number of punch heads and the shape of the punch head (CX 184T-Y, Z–1). A punch head is the mechanism which is activated to punch holes in paper (Tr. 1963). Punch heads come in various diameters and shape (CX 184Z–2).

340. Master Products produces sales binders which also utilize the sections used in its visible filing equipment (Tr. 1891; CX 184B), except for the compression binder which holds loose-leaf paper by a compression method as opposed to using post or ring sections (Tr. 1969). Master Products' "Streamliner" cases are also sales binders (Tr. 1916). Sales binders vary in size depending on the number of sections they accommodate (CX 184Q, P, S).

341. There are no differences in the products Master Products sells to both dealers and wholesalers, including Boise (Tr. 1934–35, 1953, 1955, 1962–69).

c. *Sales In Commerce*

342. Master Products manufactures its products in Los Angeles, California; it has not operated any separate distribution facilities for forty years. Products are shipped directly from its plant in Los Angeles to the customer (Tr. 1898–99).

d. *Sales Policy*

343. Master Products gives dealers the discounts off list price indicated on the following product groups:

visible sectional filing	40%

indexing		40%
punches:	1 to 5	40%
	6 to 23	40–10%
	24 to 71	50%
	72 to 143	50–5%
	144 or more	60%
punch parts		40%
sales binders:	1 to 29	40%
	30 or more	40–5% **[64]**

The discounts have not changed for twenty-three years (Tr. 1903; CX's 189, 176).

344. Master Products also has a "master stationery" or "MS" customer classification. There are seven to twenty customers in this class. Master Products gives MS customers the discount off list price indicated on the following product groups:

visible sectional filing		50%
indexing		50%
punches:	1 to 72	50%
	72 or more	60%
punch parts (when ordered with punches)		60%
punch parts (when ordered alone)		50%
sales binders		50%

These discounts have been in effect for twenty-three years with minor changes (Tr. 1920–23; CX 424).

345. Master Products gives some customers a wholesale functional discount. These customers are designated "MSW's" for internal purposes (Tr. 1914–15). All MSW's resell to dealers with the possible exception of one or two who buy for resale to the computer industry (Tr. 1918). Master Products gives MSW's the discounts indicated on the following product groups:

visible sectional filing	55%
indexing	55%
punches	60%
punch parts (when ordered with punches)	60%
punch parts (when ordered alone)	50%
sales binders	50%

These discounts have been the same for approximately forty years (Tr. 1915–16; CX 175).

346. Master Products has classified Boise as an MSW for discount purposes for at least the last ten years (Tr. 1981–85).

347. During 1979, Master Products' freight terms were the same for all customers. Customers paid freight from Los Angeles or from a

Chicago basing point, whichever cost was lower (Tr. 1933–34). An exception to this policy was for orders of 100 lbs. or more for which Master would pay freight up to 11% of the invoice (CX 189). **[65]**

348. Master Products' payment terms are the same for all customers (Tr. 1934).

e. *Examples Of Discriminatory Sales*

(1) Visible Sectional Filing

349. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, Weber, Wist, and Helwig purchased visible sectional filing of one or more of the following types from Master Products at a discount of 40%: bases, cabinets, extensions, turntables, ring sections, multi-post sections, and bar sections (Tr. 4156–61; CX's 3A-B, E-I, P-Q, U-V, Z–2, 440A, 444B-C, 445B-C).

350. During 1979, Boise's distribution centers which competed with the dealers identified in F. 349 purchased the same types of bases, cabinets, extensions, turntables, ring sections, multi-post sections, and bar sections as did those dealers at a discount of 55% (Tr. 4156–61; CX's 3A-B, E-G, P, U-V, Z–2, 440A, 444B-C, 445B-C).

351. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, Weber, Wist, and Helwig paid Master Products one-third more for visible sectional filing equipment than the Boise distribution centers with which they competed (F.'s 349–50).

(2) Tabs

352. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West and Wist purchased slip-lok tabs or slip-lok tabs and alphabetical perma-seal tabs from Master Products at a discount of 40% (Tr. 4156–61; CX's 3C, J-K, R, W, 440A, 444B-C, 445B-C).

353. During 1979, Boise's distribution centers which competed with the dealers identified in F. 352 purchased the same types of slip-lok tabs and alphabetical perma-seal tabs from Master Products as did those dealers at a discount of 55% (Tr. 4156–61; CX's 3C, J, R, W, 440A, 444B-C, 445B-C).

354. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Kelly, Mid-West, and Wist paid Master Products one-third more for tabs than the Boise distribution centers with which they competed (F.'s 352–53). **[66]**

(3) Punches

355. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Mid-West, Weber, Wist, Charlie Helwig, Kilham, and Klip purchased three-hole punches of one or more of the following series from Master Products at a 40% to 50% discount: 25 series, 33 series, 1,000 series, and 5,000 series (Tr. 4156–61; CX's 3D, L-M, Revised N, S-T, X-Y, Z–3–Z–4, 440A, 444B-C, 445B-C).

356. During 1979, Boise's distribution centers which competed with the dealers identified in F. 355 also purchased 25 series, 33 series, 1,000 series and 5,000 series three-hole punches from Master Products at a discount of 60% (Tr. 4156–61; CX's 3D, L-M, Revised N, S, X, Z–3–Z–4, 440A, 444B-C, 445B-C).

357. During 1979, G.E. Stimpson, Ruggles, John L. Bird, The Stationers, Trick & Murray, Mid-West, Weber, Wist, Charlie Helwig, Kilham, and Klip paid Master Products from 25% to 50% more for three-hole punches than the Boise distribution centers with which they competed (F.'s 355–56).

(4) Compression Binders

358. During 1979, Trick & Murray and Wist purchased sales or compression binders from Master Products at a discount of 40% (Tr. 4156–61; CX's 3"O", Z–1, 440A, 444B-C, 445B-C).

359. During 1979, Boise's distribution centers which competed with the dealers identified in F. 358 purchased the same types of products from Master Products as did those dealers at a 50% to 55% discount (Tr. 4156–61; CX's 3"O", Z–1, 440A, 444B-C, 445B-C).

360. During 1979, Trick & Murray and Wist paid Master Products 20% to 33% more for sales and compression binders than the Boise distribution centers with which they competed (F.'s 358–59).

f. *Volume Of Boise's Purchases From Master Products*

361. Master Products sold to all Boise distribution centers in 1979 (Tr. 1893). Its sales to selected distribution centers of Boise were: [67]

Boston	$ 8,471.98
Moonachie	5,457.90
Pennsauken	23,865.28
Phoenix	5,179.27
Salt Lake City	1,424.07
Seattle	72,859.80
Portland	20,026.21
San Francisco	11,247.98

(Tr. 1896–97).

362. Boise's total purchases of office products from Master Products in the years indicated were:

1976	$ 341,123
1977	429,678
1978	574,688
1979	628,163
1980	722,343

(CX 630G).

g. Boise's Possession Of Price Information

363. Boise had in its files a copy of Master Products' trade price list, effective February 1979, which contained discounts extended to dealers (Tr. 1904; CX's 189, 438A, 439B).

364. Boise's Buyers' Guides dated November 11, 1977, May 16, 1978, and January 1, 1980, reflected Master Products' published discounts to dealers (CX's 181A, 182–83).

365. Hal Webb has been employed by Master Products for twenty-three years and is Chairman of its Board of Directors (Tr. 1885). In his opinion, major wholesalers knew the discounts at which Master Products sold to dealers (Tr. 1980). There are few secrets concerning prices available to dealers, according to him (Tr. 1980–81).

366. Prior to about 1972, Master Products did not classify certain Boise distribution centers as MSW customers and did not extend the wholesale functional discount to those distribution centers. During that period, those distribution centers purchased at the dealer discount (Tr. 1981–85; CX 672, pp. 138–39). **[68]**

10. Boise Knew Or Should Have Known The Prices Which The Six Manufacturers Charged Dealers

367. The six manufacturers have, for many years, sold to a group of customers which they have classified as wholesalers and to whom they have granted wholesale functional discounts. This group includes Boise (F.'s 489–95) which was aware that these manufacturers granted it a wholesale functional discount. In fact, Boise's proposed findings concede that the six manufacturers' "initial discounts which are then deducted from the list price to arrive at the purchaser's invoice line price" are functional discounts (RPF 109). Furthermore, Mr. Twietmeyer's stipulation states (F. 14):

> As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesale functional discounts. . . .

368. Boise was also aware, from calls which its salespersons made on accounts which were solicited as well by dealers, that it competed with dealers (F.'s 98–100) and the evidence obtained from its files, as well as complaints received from dealers, reveals that it knew the six manufacturers granted it a greater discount than they did to dealers (F.'s 36, 42, 147–53, 194–97, 241–45, 276–82, 326–27, 363–66). Even if this conclusive evidence had not existed, it is inconceivable that Boise, which resells to dealers, would be unaware of the prices which manufacturers charge dealers, for other wholesalers who testified expressed keen interest in and awareness of dealer prices (F.'s 30–33), as did Boise employees (F.'s 37–41).

369. Finally, Boise has acquired dealers, one of which, Dennis, purchased at the dealer price before its acquisition. Boise had access to Dennis' records and must have been aware of the prices at which manufacturers were selling to dealers (F. 39).

370. Boise's answer to all of this evidence is that the six manufacturers, and others, do not sell at published prices, but at prices which are generally the same regardless of the functional status of its customers.

371. The detailed charts presented by complaint counsel which reveal continuous and significant discriminations favoring Boise over its dealer competitors simply do not square with the claim that off-list discounts are rampant, but Boise ignores the evidence of the charts. [69]

372. Boise argues, instead, that it does not "know" that manufacturers adhere to published prices and that the charts—even though they may show a clear pattern of discrimination—are not as significant as the belief of its employees that there is no discriminatory pricing in this industry. Thus, Boise relies on the testimony of persons such as Mr. Welnhofer, a former general manager of its Office Products Division, who stated that "pricing in this industry is a jungle" and that he didn't know whether "they [manufacturers] sell everything at the prices that they publish" (CX 672, pp. 122-23), and Mr. Bazant, Product Planning and Development Manager of Boise's Office Products Division, who argued that the six manufacturer's policies "allow the dealer and Boise Cascade to buy at approximately the same cost." This conclusion was based on additional discounts which are given such as "promotional monies, free goods, spiffs to the house sales people, contract pricing," etc. which could affect the published price by 25% or more (Tr. 4770–73).

373. I do not accept this belief as probative of Boise's lack of knowledge for it is based on a self-serving, and undocumented, view of the industry. If these management officials truly believed that their company enjoyed no better pricing than dealers, then they should have

advised their superiors to settle this matter. Instead, Boise has insisted upon the right to receive wholesale functional discounts when it competes with dealers, a right whose importance Boise has recognized (F. 63). Thus, I do not credit the testimony of Mr. Welnhofer and Mr. Bazant; the true state of Boise's knowledge is revealed, I believe, in Mr. Twietmeyer's stipulated testimony:

> Boise received a substantial dollar amount of trade or wholesale functional discounts from various office products vendors and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer or contract stationer (F. 14).

374. Boise's other arguments on this point involve either irrelevancies or rely on shaky interpretations of record evidence. For example, the claim that all manufacturers sell significant product lines on a purely volume basis (RPF 110–11), while true (CRB, p. 5) has nothing to do with the functional discounts at issue here.

375. Similarly, while some manufacturers may give contract stationers discounts equal to their wholesale functional discounts (RPF's 49, 113–14), only one of the six involved in this case does (Bates) and only to a small number of its some 1,200 active accounts (Tr. 2210, 2221, 2224, 2226). **[70]**

376. Dealers do receive special bid discounts (RPF's 50, 128–29, 250–58), but there is no evidence that they have either received lower prices than Boise on a significant volume of their purchases[6] or that they have consistently used bid-priced merchandise in their regular sales.

377. Boise also argues that dealers' prices are negotiated and that they can buy at the same price as Boise from unpublished price lists (RPF's 51–59, 104–06). This assertion is simply not supported by the record evidence cited. An example of Boise's liberal interpretation of the record is RPF 52, where it is claimed that Mr. Crompton of Hugh A. George testified that he buys "generally at an unpublished price;" it is clear, however, that the words "unpublished price" refer merely to the fact that he—like Boise and all other industry members—purchases at the manufacturers' list prices less a discount (Tr. 693–94). There is simply no way that anyone familiar with industry pricing could state that this language supports the claim that Hugh A. George enjoyed unpublished prices.

378. Complaint counsel's reply brief extensively analyzes and convincingly refutes Boise's claim that dealers enjoy the same prices it does, but I will not repeat all of their arguments. A few examples

[6] Manufacturers' bid sales are a very small portion of their total sales (F.'s 16, 19).

suffice to show that Boise's reading of the record is too expansive to be relied upon.

379. Thus, while Mr. Cleary, sales manager of Boise's Boston distribution center, and a former assistant sales manager at Monroe, one of the selected dealers, testified that, in general, Boise's and Monroe's purchase prices were identical, he referred only to the prices of five manufacturers (Tr. 4622–23) of the several hundred who sold to Monroe (Tr. 2462). Furthermore, it is unclear whether the prices he reviewed were in connection with bids or the manufacturers' regular pricing (Tr. 4622); in addition, Mr. Cleary conceded that he did not do a systematic study of the prices paid by Monroe and Boise (Tr. 4623).

380. Boise also relies heavily on the testimony of Mr. Rodman, the general manager of its Boston distribution center, and the former president of Dennis Office Supply. Mr. Rodman stated that after reviewing Dennis' and Boise's prices from manufacturers "what stuck out in my mind are that Dennis Office Supply, on some of the items, was getting lower prices than Boise Cascade was" (Tr. 4456).

381. Complaint counsel spend seventeen pages of their reply brief commenting on this and other testimony of Mr. Rodman; [71] after analyzing their argument, I agree with them that his testimony does not support the conclusion that Boise and Dennis often enjoyed the same prices or that Boise paid higher prices than Dennis. For example, he testified that he became aware that Dennis was buying ACCO products at lower prices than Boise because of a conversation with Mr. Twietmeyer (Tr. 4461), but Mr. Twietmeyer had no recollection of such a discussion (Tr. 6744). Furthermore, specific ACCO pricing which he referred to (Tr. 4559–60) was denied by an ACCO representative who reviewed its sales from October 1977 through March 31, 1979 to Dennis and Boise. She testified that "It's not possible" that his testimony regarding ACCO's prices was accurate (Tr. 6709–10). A representative from Swingline also testified, after analyzing the appropriate files (Tr. 6621), that Mr. Rodman's recollection of its prices to Dennis was "mistaken" (Tr. 6624). Other instances of Mr. Rodman's inaccurate testimony are detailed in complaint counsel's reply brief (CRB, pp. 142–54)—so many, in fact, that I find that none of his testimony regarding the availability of discounts is credible.

382. Boise also relies on prices offered by one of the selected dealers, John L. Bird, to the Metropolitan Bus Company of Seattle (RX 246) to prove that manufacturers sold to Bird at lower prices than to Boise. These manufacturer's prices are arrived at by backward calculations from Bird's and Boise's offering prices using unwarranted assumptions about markups (CRB, p. 25). I will not accept calculated prices of such dubious ancestry as support for the sweeping conclusion that Boise is not a favored purchaser.

383. In conclusion, the only reliable evidence of prices which were charged to Boise and the selected dealers is contained in the charts (CX's 1–6). Boise's attempt to inject uncertainty about the manufacturers' pricing in support of its claim of lack of knowledge is rejected because it is based on inaccurate and misleading testimony and unwarranted assumptions derived from that testimony. I therefore find that the charts accurately reflect the discriminatory prices at which the manufacturers sold office products to Boise and selected dealers, and I find that Boise knew or should have known the prices at which it and the selected dealers purchased those manufacturers' products.

E. *Dealer Injury*

1. Accounts Lost To Boise By Dealers

384. Twenty-one of the twenty-three selected dealers testified that they have lost accounts to Boise in recent years. In some cases, all of the business of an account was lost; in others, only part of its business was transferred to Boise distribution centers. The accounts were lost either [72] because of Boise's lower prices, better service, or a combination of these factors (Tr. 657–59, 1342, 2038–39, 2432, 2498–501, 2607–09, 2915–21, 3035, 3145, 3241, 3327–28, 3359–60, 3425, 3429, 3434–35, 3557, 3665–70, 3804–06, 3812–13, 3815–16, 3897–900, 3981–85, 3989–94, 4081–82, 4218). Details of some of the lost accounts are given in the following findings.

385. In 1980, Delaware Trust Co. in Wilmington moved its $100,000 annual office supply account which had been shared equally by Hugh A. George Co., George D. Hanby Co., and H&H Stationers, to Boise's Pennsauken distribution center (Tr. 5824–26). The decision to change suppliers was based on a computerized stock control program offered by Boise which was not available from the three former suppliers (Tr. 5829–32).

386. A. Pomerantz, a large office products dealer in Philadelphia, lost the Bell Telephone of Pennsylvania bid in 1980 to Boise. Pomerantz had been one of many dealers that had been supplying Bell Telephone of Pennsylvania. Its annual sales to Bell before 1980 were $30,000 to $40,000. Sales in 1982 were less than $5,000 to $6,000 (Tr. 1343–46; CX 560A-B).

387. Capitol Milk Producers is an account which Andrews Office Supply in Washington, D.C., lost to Boise based on price. Andrews' pricing to Capitol Milk Producers was 20% off manufacturers' list. Boise priced Capitol Milk at 38% off manufacturers' list. Mark Cashman, General Manager of Andrews, testified that he was told personally that the 38% discount applied to "any quantity, any order" (Tr. 2609–10).

388. National Semi-Conductor is an account now served by Boise's Salt Lake City distribution center (Tr. 5051). Weber Office Supply, one of the larger dealers in the Salt Lake City area, had the account during 1981. Boise took the account from Weber in March 1982 because of lower prices, in the opinion of Sue Anderson, General Manager of Weber (Tr. 3806, 3809–11).

389. Tandem Computers is a Boise account in San Francisco (CX 977, p. 102). Prior to 1980, Tandem had been one of Curtis Lindsay's larger accounts, doing about $20,000 per month. After complying with a request for pricing by one of Tandem's divisions, Curtis Lindsay lost the business. In trying to regain the full account, Curtis Lindsay was told by the account that its prices were higher than Boise's (Tr. 3897–99). Curtis Lindsay also lost to Boise the one division of Fairchild that it had served (Tr. 3899). Boise now has all of the eight or nine Fairchild divisions (CX 977, p. 106). Fairchild consolidated its purchasing for all divisions and Curtis Lindsay was asked to submit pricing. It did so, but Fairchild stopped ordering. Curtis Lindsay made several attempts to regain the business, each time cutting its prices until its final pricing was near cost, but Fairchild's buyer said its prices were still too high (Tr. 3899–900). **[73]**

390. Victoria Station, a restaurant chain headquartered in Marin County about twenty miles from San Francisco, is a Boise account (CX 977, pp. 118–20) which was taken from Gilbert-Clarke in approximately 1978 or 1979. Victoria Station, which had purchased approximately $15,000 to $20,000 per year from Gilbert-Clarke, changed to Boise because of pricing and services which Boise offers (Tr. 3330–31; CX 977, p. 120).

391. "Considerably better" price was the controlling factor in the loss of Weyerhauser Corporation by The Stationers, a Tacoma dealer, to Boise's Seattle location in 1970–1971 (Tr. 3559–60). When Weyerhauser changed to Boise, it was The Stationers' largest account, doing $10,000 to $12,000 per month, approximately 14% of the total sales volume of The Stationers (Tr. 3557–58).

392. Rainer Bank is a customer of Boise's Seattle location (CX 976, p. 159). In the early 1970's, it had been Trick & Murray's largest supplies account, purchasing about $125,000 per year before it was lost to Boise (Tr. 3435–36, 3439). Another account obtained by Boise's Seattle location from Trick & Murray was Perkins Coie. The account had purchased about $50,000 per year until Boise took it in approximately 1980. Perkins Coie changed to Boise because of lower prices and because of a computer-generated usage report which Trick & Murray could not provide because of inadequate computer capability (Tr. 3429–31).

393. The City of Seattle is an account of Boise's Seattle location that

is considered a major account by its manager (CX 976, p. 151). A number of dealers had sold to the city but John L. Bird had the majority of the city's business before 1973, when the account switched its business to Boise, with the exception of small orders for quick pick-up (Tr. 4124–25). Boise's salesman testified that although Boise has not always made the low bid to this account: "The City of Seattle buys from Boise because of usage reports, because of some of the sophistication in the invoicing system, because of depth of inventory and high [fill] rates" (Tr. 5573).

394. Monroe-Narcus Stationers in Boston lost the 14-year old Raytheon account to Boise in 1981. Raytheon had been Monroe's largest account, purchasing about $1 million per year, or some 12% of Monroe's total sales. Bernard Julius, co-owner of Monroe, who was personally in charge of the account, testified that Raytheon's contract manager told him that the reason for the change to Boise was "strictly economics." Boise had guaranteed to hold contract prices for one year. Mr. Julius felt that he could not do this and still make a profit (Tr. 2432–34).

395. Boise's Boston location bid against G.E. Stimpson and took the Prime Computer account in 1981, which Stimpson had served since the inception of the company. Prime Computer had been purchasing about $35,000 per month from Stimpson (Tr. 2915–16). In another bid situation, Boise's Boston location under-bid [74] G.E. Stimpson for the Hospital Services of New England account, an organization of 100 member hospitals (Tr. 2915–18). G.E. Stimpson had been servicing approximately fifty of these hospitals, and lost about 20% to 30% of its volume of business, but retained some because of its previous history of service (Tr. 2917–18). Another G.E. Stimpson account from which Boise's Boston location obtained increased business in 1981 was Arkwright Boston (Tr. 4555–56), resulting in a loss to Stimpson of approximately $1,000 to $2,000 in sales per month (Tr. 2920).

396. Reilly-Stoker Corporation is another account where Boise's Boston location successfully under-bid G.E. Stimpson (Tr. 4553). Reilly-Stoker is located in Worchester, Massachusetts, the same city where G.E. Stimpson is located, and had been using Stimpson as its sole supplier until Boise offered them significantly better prices. Stimpson lost about $8,000 in monthly sales volume when it lost this account (Tr. 2920–21).

397. Monroe-Narcus also bid against Boise's Boston distribution center for the Hospital Services of New England business, offering 30% of manufacturers' suggested list for items carried in inventory and 15% off manufacturers' suggested list for all other office products (Tr. 4689–90). Boise won the bid with prices at 35% to 40% off manufacturers' suggested list for everything in Boise's catalog and 35% off

manufacturers' suggested list for items not in the catalog (Tr. 4556–57).

398. Boise's Boston location obtained the New England Telephone account in 1979. It had previously been served by a number of dealers, including Union Office Supply (Tr. 2038, 2140). Prior to Boise obtaining the account, Union sold it about $250,000 per year in office supplies, which was about 30% of its total sales at the time (Tr. 2039). Although Boise may have offered a little better pricing than Union, the other factor which led the telephone company to go with Boise instead of Union was that Boise had a computerized backup system that Union did not have at the time (Tr. 2145).

399. Robert Helwig, owner of Charlie Helwig, Inc., in Portland Oregon, lost the Halton Tractor account that had been with Helwig for many years to Boise's Portland distribution center in 1979. Boise offered end-column pricing, its lowest prices, if Halton Tractor agreed to buy all of its supplies from Boise (Tr. 3359–62). Mr. Helwig was told by Mr. Alexander of Halton that Boise's prices were "considerably less" than Helwig's (Tr. 3362). Boise's Portland location, since getting the Halton Tractor account, has realized as much as $40,000 per year in sales of office supplies to Halton in good times, and about one-third of that figure recently (CX 974, p. 129).

400. Consolidated Freightways was a long-time customer and the largest account of Charlie Helwig, Inc., and bought as much as $70,000 annually in office supplies before switching most of its business to Boise. Helwig's sales to Consolidated were about [**75**] $13,000 in 1982 (Tr. 3370–72). Boise's employees did not agree as to how they managed to get Consolidated Freightways' business. Richard Viskov, former sales manager, testified that Boise's prices were not lower but that he called on the account since 1973 and finally "wore the account down" and got the business (Tr. 5375–76). On the other hand, Rick Mealy, a Boise salesman, testified that the change resulted because Helwig was charging Consolidated list or close to list prices. Boise was not charging list prices to this customer (Tr. 5426–27).

401. FMC is an account of Boise's in Portland (CX 974, p. 109). Kilham Stationery had served the account for about fifteen years. Boise took FMC by offering 40% off list (Tr. 3668), usage reports, easy order forms and a basic supply system (Tr. 5370). Wakefield Mack, owner of Kilham, testified that the buyer for FMC had said to his salesman that "she couldn't afford to do business with Kilham's Stationery" (Tr. 3668).

402. Boise's Portland location identified Wagner Mining, a Klip Stationers account for ten to fifteen years, as one of its target accounts (CX 95Z–10). Boise succeeded in 1981 in taking all of the Wagner account, which had been buying $2,000 per month from Klip (Tr.

3247–48) by offering services such as cost center summary billing and cataloging even though its prices were higher (Tr. 5379, 5394–95).

403. Martori, Meyer, Hendrick is an account that had been served by Wist Office Supply before switching to Boise's Phoenix distribution center (Tr. 5230, 4219–20). The account wrote the following note on a Boise invoice given to Wist's salesman by the account:

> Here is a copy of an invoice we received today. I'll be happy to review any comparable prices Wist might be able to offer us (CX 660).

On the other hand, Boise's salesperson, Janet Bode, testified that the account switched to Boise to get more frequent sales calls and access to a broader inventory than Wist carried (Tr. 5257–59).

404. There are other examples of Boise's winning bids: It bid against Yorkship and Executive Office Supply for the Vineland City Bid, under-bidding by $2,500 on contract items and giving 40% off manufacturers' list on non-contract items, against the 28% and 29% off list quoted by Yorkship and Executive (Tr. 2501). Boise took the Campbell Soup Co. and the Rancocas Valley Hospital bids from Pomerantz (Tr. 1342), and the General Electric bid from Curtis Lindsay in 1980 (Tr. 3949), as well as the Atari bid in 1982 (Tr. 5620–21). Weber Office Supply was [**76**] unsuccessful in bidding against Boise for the Mt. Fuel Supply Co. business (Tr. 3819).

405. Dealers testified that they have lowered their prices in some instances to try to keep an account when competing against Boise. For example, G.E. Stimpson dropped its prices to Wellesley College and Arkwright Boston (Tr. 2918–20). Joseph Cresci of G.E. Stimpson testified that, in competing against Boise for the Weyman Gordon account, it "cost us significantly in our margins to retain the account" (Tr. 2921). Weber Office Supply also lowered its margins to retain several accounts (Tr. 3818–19) as did Kelly Co. (to 5%) to retain four large accounts (Tr. 3995–96, 3998–99). Dealers in the Seattle/Tacoma and Philadelphia areas lowered margins to retain accounts being solicited by Boise (Tr. 4140, 3145, 2502).

406. Some dealers testified that they refrained from competing against Boise for certain accounts. Weber Office Supply has discontinued bidding on State of Utah bids and on other bid accounts. Weber considers it not worth the time and effort to bid if Boise is bidding (Tr. 3820–21). For accounts such as Amcor and Logan Hospital, Weber's sales representative does not believe that he can get his foot in the door (Tr. 3819). Mid-West Office Supply has stopped actively seeking bid business because it was unable to price competitively against Boise and maintain the margins needed to be a financially viable business (Tr. 3039–41).

407. None of the selected dealers who lost accounts in whole or in part to Boise were able to conclude that the losses were due to the different prices charged them and Boise by the six manufacturers (Tr. 2646–50, 3091, 2464, 4641, 714, 4455, 177–78, 190–91, 196, 202, 206, 211, 215–16, 223, 231–32, 2671, 2674, 2679, 2145, 1455–61, 2981–82, 2989–90; CX 702, pp. 106–15, 177–78, 182–83, 190–91, 196, 201–02, 206, 211–12, 215–16, 223, 231–32).

2. Accounts Lost To Dealers By Boise

408. The battle between dealers in the office products industry is highly competitive (Tr. 655, 2603, 2651, 2037, 2431, 3191, 3665, 1340, 2497; CX's 702, p. 76; 972, p. 51; 672, p. 22; 44D, 69Z–17) and it is inevitable that when Boise competes with the selected dealers it will lose accounts to them.

409. Boise employees identified accounts who, although not always lost, were offered lower prices by many of the dealers who testified or dealers in the same areas. These include: Seattle Public Health Hospital, Pioneer Annuity, Talos, Farm & Home Life, Metro Seattle, Safeco, State of Arizona, Motorola, Digital Equipment, Boswell Memorial Hospital, Phoenix General Hospital, American Benefit Plan, Merck, Sharp & Dohme, State of Utah, [77] Hercules, Group Hospital Association, Colonial Penn Insurance, Franklin Mint, Converse Rubber, Canada Dry, Century Bank & Trust, Raytheon, Wellesley College, Form Corp., Grossmans, Cumberland Farms, Fred S. James, Blue Cross/Blue Shield, Boston Financial Data Services, Sperry Flight Systems, Kaibab Industries, Sullivan & Mason, ADP, EIMAC, DuPont, Honeywell, Citizens Bank, Seattle First National Bank, Children's Orthopedic Hospital, CH2M Hill, United Technology, Sohio, Sperry Univac, IBM, First Interstate Bank, United States National Bank, and Polaroid (Tr. 3805, 687–88, 4500–05, 4508–11, 4642–47, 5175, 5189, 5194–97, 5611–12, 5615–20, 5365–68, 5380–87, 4964–66, 4987–88, 5198–200, 5584–85, 5247–52, 5273–75, 5519–27, 4111–15, 2469, 5689–99, 4488, 4491, 4497; CX 976, p. 180). Some detailed examples of situations where Boise faced lower prices from dealers follow.

410. Mr. Ralph Barnett, of Boise's Washington, D.C. sales office, discussed several instances where dealers offered lower prices to customers then Boise. Mr. Barnett first solicited Group Hospitalization in Washington, D.C. seven years ago, and offered prices that were 22% over Boise Cascade's cost and received only six of 135 to 140 items. Andrews, one of the selected dealers, received the business instead of Boise. Since that time, this account has given more business to Boise, even though it has not lowered its prices, because of the service it provides. Mr. Barnett saw the prices offered by Andrews and

another dealer on one item. Boise's price was 10% higher (Tr. 5748–55).

411. Mr. Barnett also solicited the business of the University of Maryland which at that time purchased from the lowest-priced vendor. Mr. Barnett offered prices that were 25% over cost and did not do very well; he then reduced Boise's prices to 20% over cost but sold only some minor items because dealers were offering this account lower prices. Mr. Barnett then emphasized Boise's services and he convinced the University to buy from Boise without lowering his prices (Tr. 5755–62).

412. Mr. Barnett was recently provided a dealer's price list by one of his accounts, Interstate Federal Savings and Loan. The price list, according to an analysis by Interstate's buyer, offered prices on seventy-two items that were on average 33% below those offered by Boise.[7]

413. Two other accounts informed Mr. Barnett that a Washington, D.C. dealer, M.S. Ginn was offering pricing that was 40% and more off the list price, well below the prices offered by Boise. In one instance, Mr. Barnett was forced to lower his [78] prices to obtain business from the account (Tr. 5762–64, 5774–78).

414. Mr. Hallstrom, a sales representative from Boise's Salt Lake City distribution center, periodically submits bids to Salt Lake City for its office products needs. He reviews the bid recaps made public by the city to see where Boise's pricing is in relation to its competitors. A bid recap by the city reveals that Boise obtained only 20% of the bid while a dealer was awarded the remaining 80%. Mr. Hallstrom submitted pricing to two school districts which was only 4% to 5% over Boise's costs. The bids were worth well over $100,000 and Boise received 15–20% of the business of one and 10% of the other (Tr. 5026–28).

415. The Church of Latter Day Saints buys approximately $500,000 worth of office supplies annually. Boise receives only a small amount of the business because dealers offer the Church lower prices (Tr. 5029).

416. Mr. Hallstrom solicited Utah Power and Light Co. for many years. He started out offering column pricing without success, then lowered the prices offered from 22% gross profit down to 8% gross profit without receiving any business. Finally at 6% gross profit, Boise Cascade received a small amount of business. One of the principal suppliers of this account is Mid-West (Tr. 5030–31).

417. Mr. Lothar Vielstich, general manager of Boise's Salt Lake City distribution center testified about a 1980 bid which Boise submitted to the State of Utah, which awards its bids on the basis of price.

[7] Mr. Barnett recalculated the differences and, after finding a few errors, concluded that the difference was actually 30% (Tr. 5770–71).

Boise's bid was priced at 5% to 10% over its costs, but it was not awarded any of the bid (Tr. 4964–66, 4979). Boise received a recap of the bid from the state. After reviewing the recap, and believing that the dealers quoted prices below Boise's costs, Mr. Vielstich called Mr. Bazant at Boise's headquarters to "find out how come we have to pay such a high price for our products" (Tr. 4983).

418. Mr. Ian Patrick, general manager of Boise's Philadelphia distribution center, testified to losing four accounts in the last quarter of 1982 with combined business of over $700,000 because dealers offered lower prices to these accounts. Boise offered prices to one of the accounts, Merck, Sharp & Dohme, that gave only 5% to 7% gross profit on stockroom items and column eight on the nonstock items. Boise lost the business to Pomerantz (although it was very competitive on stockroom items) because, according to the buyer, its column eight prices were 25% higher than Pomerantz's (Tr. 5693–95). Boise submitted prices to Group Hospital Association that were 8% to 10% over cost, but it lost the bid because, it was told, its prices were too high (Tr. 5695–96). Boise also submitted prices to Colonial Penn Insurance and Franklin Mint which were 4–6% above its costs and still lost the business to dealers (Tr. 5696–99). [**79**]

419. Boise's Boston distribution center submitted prices to United Technology, whose business was worth over $2 million annually, in 1979, 1981 and 1982. After learning that its prices in 1979 and 1981 were not competitive, Boise offered prices in 1982 that were 5% over cost, but lost the bid to a dealer because, it was told, its prices were still 5% to 7% too high (Tr. 4511–12).

420. Mr. Cleary, of Boise's Boston distribution center, testified that Monroe, one of the selected dealers, took all or part of the business of several accounts from Boise, in one case, according to the buyer, offering 20% lower prices on some items (Tr. 4642–46). Monroe also offered lower prices than Boise to Converse Rubber, Canada Dry and Century Bank & Trust (Tr. 4488, 4491, 4497). The bank eventually returned to Boise because of service problems with Monroe (Tr. 4492).

421. Jan Bode, a sales representative for Boise's Phoenix distribution center testified that Boise lost four accounts to Wist, a selected dealer because Wist offered lower prices (Tr. 5246–52), and the sales manager for this office named three more accounts where Wist beat Boise's prices (Tr. 5189–200).

422. Not all of the record instances where Boise or the selected dealer lost cusomters to each other are described above, but switches of this kind from supplier to supplier are not uncommon, as some of the dealers confirmed (Tr. 2655, 2657–60, 3402–03, 3410–13, 3074, 4280–81, 1386–90, 2536–40, 2964–65, 685–87, 2078–82, 3187–89; CX 702, pp. 82, 173).

3. The Selected Dealers' Performance In Recent Years

a. *Net Profits*

423. The major industry trade association, NOPA, compiles data on dealer operations and publishes the data in the Dealer Operating Results (CX's 355–57) which have been compiled for over fifty years (Tr. 1808). About six to seven thousand copies are printed and they are distributed primarily to dealers, manufacturers and wholesalers. Dealers use them in comparing their business to other dealers (Tr. 1812) and in approaching banks for loans. Dunn & Bradstreet republishes a portion of the Dealer Operating Results (Tr. 1813).

424. In the opinion of the Executive Vice President of NOPA, Mr. Haspel, the Dealer Operating Results "is a pretty good overall sample of the industry," not just of the dealers who report (Tr. 1815–16). [80]

425. Net profit before taxes as a percent of sales is computed by NOPA and included in the Dealer Operating Results (Tr. 1856). For each year between 1967 and 1980, dealers' median net profit before taxes as a percent of sales was between 3.0% and 3.9%, except in 1974 when it was 4.3% (CX's 355, p. 3; 357, p. 2).

426. Ronald Rowe, complaint counsel's accounting expert, reviewed the Dealer Operating Results. Mr. Rowe has been an accountant with the Federal Trade Commission for over twenty-two years and his work regularly involves financial standards or benchmarks (Tr. 7104–05). He has personally worked on aggregating industry data, including industry profitability data, in the Quarterly Financial Report Program, and the Rates of Return in Selected Manufacturing Industries publications, as well as the aggregating of industry data as necessary for cases he has worked on (Tr. 7107–08).

427. In Mr. Rowe's opinion, the financial information shown in the Dealer Operating Results is reliable; his opinion is based on Mr. Haspel's testimony concerning the data, the uses made of the report, the consistency of the figures from year to year, the fact that the report has been published for over fifty years, and the general reliability of trade association data of this type (Tr. 7110).

428. Mr. Rowe also presented data from The Robert Morris Associates' Annual Statement Studies showing, for retailers of office supplies and equipment, net profit before taxes as a percent of sales for five periods between June 30, 1977 and March 31, 1982 to be in the range of 3.2% to 3.9% (CX 2300).

429. In Mr. Rowe's opinion, the Robert Morris Associates' Annual Statement Studies is reliable. The basis for that opinion is that the information is used by banks for determining whether credit will be given, and virtually every financial analysis reference book or text book which mentions an external source for industry information

mentions Robert Morris; moreover, the studies have been published for over sixty years (Tr. 7112–13).

430. Mr. Rowe also computed the median net profit before taxes as a percent of sales for the dealers who testified and whose financial information was available. For the years 1976 to 1981, their median net profit before taxes as a percent of sales ranged from 2.3% to 3.5% (Tr. 7119; CX 2301).

b. *Sales And Gross Profits*

431. Mr. Bertholdt, who has had considerable experience in reviewing and analyzing the financial statements of small businesses (Tr. 4336–38, 4348), reviewed the financial statements and income tax returns of the selected dealers to evaluate their [81] financial viability (Tr. 4334, 4341–42). After analyzing the sales and gross profits of eighteen dealers for which such data was available for each year 1977 through 1980 (Tr. 4348), he testified that all eighteen dealers enjoyed an increase in sales and that the average annual growth was in excess of 22% (Tr. 4348–49; RX 300). Gross profit grew at the same rate (*Id.*). Mr. Bertholdt considered such growth unusual, particularly in light of the recessionary economy during the period 1977 to 1980 (Tr. 4350).

432. Dr. Elzinga also examined the financial performance of the complaining dealers:

> But basically, as the sheet [RX 804] shows on the face of it, it gives the dealer sales for all of the dealers for which sales figures were available for the period '77 through '80. If you even give a casual glance, much less a long studied reflection of the sheet, you find that for these dealers their sales are increasing, in some cases not dramatically, in some cases quite dramatically.
>
> But the overall assessment I make of this, as one kind of proxy measure of their viability, is these are a group of firms whose sales are definitely on an upward trend and their sales trend is upward at a time when, for many retail businesses, you just wouldn't get figures like this.
>
> * * * * * * *
>
> With regard to their credit rating, I asked to see a Dun & Bradstreet report for each of the complaining dealers. That was secured and paid for, not by myself, but someone else who provided this information to me. I spent a fair amount of time studying all of the D&Bs for the complaining dealers.
>
> * * * * * * *
>
> If I can give a short, abbreviated assessment of my study of the credit character of the complaining dealers, it is that on the whole they are dealers of good credit risks; some were marginal. I don't think any received the actual 4 rating, which is the lowest category or rating that D&B gives. There were 3s and 2s, and there [82] were a number of 1s, which is the highest that D&B gives.
>
> * * * * * * *
>
> I think the only missing thread that might need to be tied at this point is my mention of my surprise at the recent D&B reports to learn that the financial character, the trend of business, the credit ranking of a number of the companies—of the majority of the

companies that had a change, it was in the upward direction, even though, again, we are in a time period when I suspect for most industries you would find just the opposite.

But overall, the assessment of a number of the companies had not changed. Two or three, I think, had gotten worse. Eight or nine, I believe, is the number you will find when you examine these documents tonight that the credit ranking, their net worth, their business trend was assessed by D&B to be up (Tr. 6124–26, 6129–30).

4. Expert Opinion On Dealer Injury

433. After reviewing the record relating to the selected dealers' lost accounts, Dr. Elzinga concluded:

Q. Well, then have you drawn any conclusions as to whether or not the evidence on lost accounts shows any injury to competition?

A. Yes, I have. The evidence that I have studied and reflected on with regard to lost accounts persuades me that you simply cannot look at that evidence and conclude that injury to competition has occurred or is occurring here.

In fact, the thing that really strikes me—and here again I speak as an economist—is you look at these dealers who are—I will call them the complaining dealers—and they have literally hundreds and hundreds and in some cases thousands of accounts, and when they are asked to give illustrations and to document the accounts they have lost to Boise, they are able to come up with a handful at best. I was really struck at the tiny number, in fact. [83]

In fact, it was in a way even troubling to me as an economist that there were not more accounts being diverted around just through normal market processes. I would have expected much more just through almost random competitive shocks.

In fact, whereas the record reveals that the typical dealer will mention a handful of accounts, you can usually count them on one hand or two at best, and then as I read on in the testimony I find that with some of those they may be out of business or there is a real question as to whether the account was truly lost, whether it was regained, whether they ever really had that account in terms of being sole supplier, whether Boise was, in fact, the customer—excuse me, the rival, that ended up with that account.

* * * * * * *

So to come back to your question, the striking thing to me is how few accounts were lost, and then when you start to get into the record as to the precise facts about those purportedly lost accounts, I find over and again that it is not clear to me they were lost to Boise, much less were they lost to Boise because Boise buys products at lower prices from manufacturers (Tr. 6119–22).

434. Dr. Elzinga's reading of the record convinced him that dealers' accounts were lost for a different reason than Boise's lower prices:

If you were trying to develop a theory of account shifting in the office products industry, probably the most robust theory you could develop is that accounts shift when salespeople shift.[8] Over and again, as I am reading testimony about account shifting, I find that the real reason the account shifted is because a salesperson left. That is, Boise hires a salesperson away from Yorkship, and they get some accounts from Yorkship. Although in that case, if you read on, you find later Yorkship gained some of those back. [84]

[8] (Tr. 3855–56, 3276–78, 4239–40, 2498, 2527, 2544–45, 2953, 681–82, 2041, 2051, 2071, 4098–104, 3467, 2444–45, 3170–71; CX 702, pp. 50–54, 219).

I think Bird hired a batch of service personnel from Boise, and a bunch of accounts shifted over to Bird. It is so common in this industry I think they have a term for it. It is called following; the salespeople have a following. The thing that struck me is the amount of evidence that seemed unambiguous of an account shifting that was explicable not by lower prices, not by better service, but by the simple pristine fact that the salesperson shifted.

Now, that I think is the most robust theory; that is, it is the most unambiguous. It doesn't explain all the sales shift or account shift. Price and service has [*sic*] something to do with it. But one can't read the record in this case without being struck by the potency of the salesperson in taking business with him, and increasingly, with her, when they leave the employ of one dealer to another (Tr. 6118–19).

5. Availability Of Lower Prices To Selected Dealers

a. *Alternative Sources Of Supply*

435. Some of the products sold by the six manufacturers enjoy strong consumer preference; for example, the owner of George D. Hanby Co. testified that "anybody that wants a numbering machine that's going to last wants a Bates" (CX 702, p. 115; *see also,* Tr. 4134–35), and Boise would not consider dropping the Bates machine from its line, even though it carries a lower priced private label machine (CX 971, pp. 63–64).

436. Testimony regarding other products involved in this case reveals that quality and price considerations differentiate them from competing products (Sheaffer Eaton At-A-Glance; Tr. 1295–96); (B&P ring binders; Tr. 2596–97); (CX 975, pp. 16–17; Tr. 7239–40, 6772–73, 1332), and that dealers select manufacturers on the basis of customer demand for their products (Tr. 2493, 1331, 3031, 3323, 3801), and the manufacturer's reputation and product quality (Tr. 3975, 1331, 2035, 3140, 4211, 3031, 3323, 3801–02).

437. Testimony also reveals that once customers decide on certain products they tend to stay with them (CX 975, p. 33; Tr. 5839, 5430). Of course, this is not a universal phenomenon; some customers will accept substitutes; others will not (CX's 974, p. 156; 976, pp. 63–64). [85]

438. In some cases, there are no substitutes for certain products; for example, Bates list finder refills must be used with Bates list finders (Tr. 4136).

439. The industry recognizes the importance of customer preference and suppliers will generally obtain approval before substitutions are made (CX 977, p. 80; Tr. 4580–81); otherwise, there would be too many returns (CX 976, p. 61; Tr. 5492).

440. Switching from one manufacturer's line to another may also result in resistance of the salespersons, and inventory control and recordkeeping problems (Tr. 3801–02, 2599–600, 3140–42, 1331–32, 3234–35, 4833–34).

441. Boise's Marketing Plans disclose that it recognizes, and caters to, customer preferences for certain products. An analysis of its competitors in the Philadelphia market noted that one competitor had good order fill accuracy with few substitutions (CX 70Z–8–Z–10) while another competitor had "some problems with bad substitutions" (CX 70Z–28–Z–30). Also, the Portland distribution center in 1980 reported "consumer trends are stable; no major swings in end use or product substitutions. Slow change in accepting non-Xerox manufactured supplies for Xerox equipment" (CX 94D). And, in a proposal to New England Telephone, Boise listed as one of its advantages compared to its competition: "Originator and creator of our Own Catalog—creates little or no substitution; our inventory mirrors our catalog" (CX 1011A; *see also* CX's 672, pp. 5–8, 149; 2077, p. 11; 1022; Tr. 4795–96).

442. Mr. Twietmeyer testified that some manufacturers' products have such well-established reputations and customer acceptance that to exclude them from the catalog would severely curtail sales (Tr. 6772–73). For example, Boise considered taking Rediform out of the catalog because it did not pay a catalog allowance, but the market demand for its products is so strong that Boise could not remove it (CX 2077, pp. 21–24).

443. John Grant was a Boise product manager responsible for choosing filing supplies and loose-leaf products for the catalog and negotiating price with the manufacturers (CX 2077, p. 9). He testified that, although Master Products does not have a catalog allowance, Boise could not consider removing Master Products from the catalog because Master Products "has 90% of the catalog [rack] market" (CX 2077, pp. 44–48).

444. At one point in time, Master Products would sell certain Boise locations only at the dealer price and threatened to cut Boise off if it transhipped from wholesale-priced locations (CX 672, pp. 138–39). The Boise locations that did not have Master Products had a difficult time substituting another catalog rack because Master Product's catalog racks are "fairly well entrenched and its also something where you generally add to. When you add to something, you try to add something that [**86**] looks the same" (CX 976, pp. 66–67). Thus, Boise, as does it competition, must consider the market acceptance of the products which it purchases (CX's 672, pp. 5–8, 149; 2077, p. 11; 1022; Tr. 4795–96).

445. Dr. Elzinga based his conclusion that the office products industry has unusually informed buyers on the fact that buyers make repeat purchases and can judge differences in quality. He testified that:

If a law firm such as this one is buying yellow pads and they find that the cardboard

backing is so flimsy that when you hold the thing on your lap it won't keep its shape for writing, they will probably tell their stationer that that is a bad yellow pad. I don't want that kind again. If you can't get me a better kind, I may shift accounts. That is what I mean, the character of the product is different than buying deodorant (Tr. 6201–03).

b. *Ability Of Selected Dealers To Obtain The Wholesale Functional Discount*

446. Manufacturers in the office products industry who grant wholesale functional discounts to companies such as Boise do not base their decision to do so on the quantities purchased by, but on the resale function of, their wholesalers; generally, wholesalers resell to dealers who would otherwise not buy directly from the manufacturer (Tr. 1582, 2741–42, 1910, 2211–12).

447. Thus, Rediform gives wholesalers a functional discount because they help the "manufacturer distribute his product through wholesale and retail sources to the ultimate consumer" (Tr. 833). Mr. Barth of Rediform testified that a wholesaler is:

> [A] customer who would purchase our products, warehouse them in one or numerous warehouses or distribution centers, would in turn distribute and sell these to retail dealers, who would provide a major catalog which is given to retailers and on through retailers to consumers and prices to go with that, who would promote the sale of those products through the dealers to the consumers, who would help the dealers in the normal conduct of their business, provide them aid and [87] assistance in doing that, who would have salesmen who call on the dealer and help to sell that, who would perform numerous functions in helping the manufacturer get his product through the wholesaler into and through the retail trade to the consumer (Tr. 815–16).

448. Because of this view of wholesalers, manufacturers do not make the wholesale functional discount available to dealers. For example, Gilbert-Clarke in San Francisco asked Rediform and John L. Bird in Seattle requested that Rediform, Bates and Master Products provide them with its wholesale discount. They were denied the discount because they were not wholesalers (Tr. 3324–25, 4074–75).

449. Kardex defines a wholesaler as a "distributor who maintains inventory on a variety of product lines for resale to dealer customers," publishes a price list, may publish a catalog and have outside salespeople. The key issue, according to Mr. Jones of Kardex is whether "the merchandise going out of the warehouse goes either to a consumer or a dealer" (Tr. 1576–78). Therefore, Kardex will not give dealers its wholesale functional discount unless they have changed from selling to end-users to selling to dealers. Dealers will not be given this discount even when, as a courtesy, they sell to other dealers (Tr. 1578–79, 1668).[9]

[9] Victor's vice-president of marketing and sales did testify that dealers who met Victor's criteria for being a

(footnote cont'd)

450. Sheaffer Eaton gives wholesalers a 50–20% discount because they sell to dealers, warehouse and promote merchandise, publish a catalog, and employ and train salesmen who call on dealers (CX 271A; Tr. 1112, 1127–28). It will not classify a customer as a wholesaler unless it meets these criteria (CX's 271A, 273; Tr. 1124).

451. B&P views a wholesaler as a customer who resells to dealers and contract stationers. It does not have any customers who purchase at the wholesale discount of 50–10–5% who do not sell to retailers (Tr. 2735).

452. Bates' criteria for classifying a customer as a wholesaler requires the customer to resell to the retail trade, carry an inventory of its products and have a catalog (Tr. 2210). Questioned as to the importance of wholesalers, C.E. Williams, President of Bates since 1958 (Tr. 2188), testified: [88]

> Q. Is it important to Bates that wholesalers sell to dealers?
> A. We consider that as their purpose (Tr. 2412).

453. With the possible exception of two customers selling to the computer industry, customers classified by Master Products as MSW's resell to dealers (Tr. 1918–19). As opposed to its MSW customers, dealers who buy from Master Products resell to end-users, not to other dealers (Tr. 1911). Master Products extends a wholesale functional discount to MSW customers (Tr. 1914–15).

454. Complaint counsel's expert witness, Dr. John Nevin, Professor of Marketing, University of Wisconsin, reviewed the testimony of the six manufacturers and concluded that they offered wholesalers a higher discount than they offered dealers, and that dealers could not obtain the wholesale discount even if they performed the same functions as wholesalers (Tr. 6938–39).

c. *Buying Groups*

455. Mr. Bazant of Boise testified that informal and formal dealer buying groups exist in virtually every geographic area and that "many vendors will sell them on a price level that is as good as wholesale or better" (Tr. 4825–26). Several formal groups were identified by other witnesses: Northwest Wholesale, Mark IV, Indiana Hoosier Group, Independent Stationers, and Chico (Tr. 4825, 3662, 3750, 1660, 1749).

456. The only buying group whose operations were discussed on the record is Northwest Wholesale, which receives wholesale prices from manufacturers (Tr. 1665–66, 2328). One dealer testified that he was

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wholesaler can obtain the wholesale price, but mentioned only two dealers who were "converted to wholesalers" to whom this discount was given (Tr. 1666–67, 1691).

aware of the existence of Northwest but decided not to purchase through it (Tr. 696–97).

457. This decision was not irrational, for dealers purchasing through Northwest do not enjoy the same prices as does Boise on the same goods. Mr. Wilhelmi of the Stationers is a member of Northwest, but buys most of his company's goods from two wholesalers, Zellerbach and Champion, because even with the rebate which he obtains from Northwest, prices on the majority of products are higher from that company (Tr. 3542–45). The real reason that the Stationers buys from Northwest is that it is a third source of supply and "we might as well belong to the 'co-op', as they refer to it, and get that rebate than not belong to it and not get the rebate, because then the price would be even higher" (Tr. 3546). [89]

458. John L. Bird Co., a Seattle dealer, buys a small amount from Northwest Wholesale, but is not a member. Mr. Hagstrom explained why he chose to buy more products from wholesalers such as Champion and Zellerbach:

> The reason we are not; initially, there is a down payment, and I believe it is approximately $6,000 to $8,000 now. They get a rebate—the members get a rebate at the end of the year, which, again, fluctuates, depending upon their profit, but I believe it's to be approximately seven to ten percent. When they give most of their pricing at 40 off, and then you get the rebate at the end of the year—even if it were 14 percent, it would come out close to about a 50 percent discount, totally, counting the rebate—we get those extreme prices from Champion and Zellerbach now locally, because we buy over a hundred thousand dollars a year from each of them.
>
> We get their extreme price, which is at least 50 percent off, and we get it quicker (Tr. 4077–78).

459. Another Seattle dealer, Associated Ruggles, buys a very small amount from the co-op but is not a member because the rebate does not offset the better pricing that the dealer can get from other wholesalers. In addition, Northwest does not stock many of the products that this dealer wants (Tr. 3138–40).

F. *Absence Of Manufacturers' Defenses And Boise's Knowledge Thereof*

1. Absence Of A Cost-Justification Defense

a. *The Purpose Of Wholesale Discounts*

460. The six manufacturers selected by complaint counsel grant wholesale discounts to Boise and to other wholesalers because of the functions performed by them, and not because of the volume of their purchases (F.'s 446–53), which, in some cases, may be no more, or even

less, than the volume purchased during equivalent periods of time by dealers. [90]

b. *Absence Of Significant Differences In Methods Of Serving Boise And Dealers*

461. Record evidence of the relationship between the six manufacturers, Boise, and dealers reveals that there are no significant differences in the manufacturers' cost of manufacture, sale or delivery resulting from different methods of manufacture, sale or delivery to Boise as compared with dealers.

(1) Manufacture

462. The goods sold to Boise by the manufacturers are not made solely for Boise; they are stock items which are produced and sold to all customers, including dealers, and there are no differences in the products sold to Boise and other customers (Tr. 1616, 2251–52, 1934–35, 1155, 2822, 855–57, 769–73, 787–88, 1534, 1542–55, 2831–32, 2254–55, 2264–69, 1074–76, 1081–84, 1953, 1955, 1962–69).

(2) Sale And Delivery

463. Although Boise's Office Products Division has a central office in Itasca, Illinois, the distribution centers function autonomously in all significant respects when dealing with manufacturers. They place orders directly with the manufacturers, and goods are shipped to the center which has ordered them (Tr. 849–50, 5330; CX's 976, p. 71; 972, pp. 24, 27; F. 67). The manufacturers also bill the distribution centers, not Itasca (Tr. 5330, 1152, 1604, 1929–30; CX's 976, p. 71; 977, p. 39).

464. Manufacturers' representatives call on Boise's distribution centers to handle returns, follow up on back orders, deal with shipping problems, answer questions, attend sales meetings and show new products (Tr. 4841, 5232, 5430, 1120–22, 1148, 1233, 2816–17, 845; CX's 977, pp. 53–54; 972, p. 53; 976, pp. 92–95; 974, pp. 64–65).

465. Boise's distribution centers are set up as separate accounts by the six manufacturers (Tr. 850, 1604–05, 1930, 2719–20, 1152, 2290; CX's 426A-R, 425Q, Y, Z–4, Z–7, Z–9, Z–13, 456A), they order in the same way as dealers do (Tr. 1149–51, 1602, 2284, 1927–28, 848–49, 2817), and they process and fill Boise's and other wholesalers' orders in no significantly different way than they do the orders of dealers (Tr. 2817–18, 1603–04, 1740–44, 1928–29, 849, 2284–86, 2291, 1149–51). [91]

466. Even where an individual order by a Boise distribution center exceeds that of an order by a dealer, the cost of filling such an order does not differ as between these customers:

Q. Mr. Jones, I will ask you the question again just so you will have it in mind. Are there any differences in the filling of an order that is reflected on [CX 701C] for Kelly and that which would have been reflected on [CX 701D] for Boise Cascade, Salt Lake City?

A. To the best of my knowledge, there are no differences. But perhaps I am not following. You said the filling of an order. And I honestly can't see what difference there would be between the two in the way we filled the order.

Q. What about the keypunching for the packing ticket that you mentioned yesterday, is there any difference there?

A. No. It would be done the same way, to my knowledge.

Q. And what about the actual packing in the warehouse, would that be done the same way?

A. Yes, to my knowledge.

Q. And the generation of an invoice, would that be done the same way?

A. Yes.

Q. Is that true even though the amount invoiced on [CX 701D] is much smaller than that on [CX 701C]?

A. That's correct (Tr. 1743–44).

467. In addition to calling on the distribution centers regularly, manufacturers' representatives call on Boise's headquarters on "goodwill" missions (Tr. 1148–49, 1622–23, 2239, 901–03).

468. Although the manufacturers use various methods of delivering their goods to customers, none are limited to one particular class of customers; generally, the method chosen depends on the size of a customers' order (Tr. 849–50, 1973–74, 2819). [92]

(3) Quantities Purchased

469. Although the totality of the purchases of all of Boise's distribution centers from a particular manufacturer over a certain period of time may, and probably does, exceed the purchases of any one of the selected dealers over the same period from the same manufacturers, such comparison is meaningless for purposes of analyzing cost savings since the products are sold and delivered to the individual centers. Thus, the proper comparison for this purpose is between each Boise distribution center which competes with each selected dealer. CX's 1–6 reveal that in many cases dealers purchased quantities equal to or greater than those purchased by a competing Boise distribution center yet paid higher per unit prices than did the center.

470. CX's 7–13 show the range of purchase sizes and median purchase sizes from the six manufacturers of goods purchased by certain Boise distribution centers and dealers with which they compete. Comparisons of the range of purchases from each of the six manufacturers show that dealers and Boise's distribution centers often purchased in the same range. Boise's distribution centers and dealers often purchased amounts less than $100, more than $1,000, and amounts in

between (CX's 7–13). With respect to each of the six manufacturers, there are examples of dealers whose median purchase size was higher than that of a Boise distribution center.

471. In 1979, Union, Stimpson and Hanby had median purchases of $447, $263, and $357 respectively from Bates. In the same year, Boise's distribution centers in Boston and Pennsauken had median purchases of $245 and $183 respectively from Bates (CX 7).

472. In 1979, Ruggles, Stimpson, Pomerantz and Andrews had median purchases of $336, $148, $158 and $287 respectively from B&P. During the same year, Boise's distribution centers in Seattle, Boston and Pennsauken had median purchases of $102, $75 and $87 respectively from B&P (CX 8).

473. During 1979, Mid-West and Ruggles had median purchases of $263 and $303 respectively from Master Products. During the same year, Boise's distribution centers in Phoenix and Salt Lake City had median purchases of $281 and $222 respectively from Master Products (CX 9).

474. During 1979, Stimpson, Appel and Kelly had median purchases of $184, $138, and $136 respectively from Rediform. During the same year, Boise's distribution centers in Boston, Moonachie, and Salt Lake City had median purchases of $90, $107 and $33 respectively from Rediform (CX 10). **[93]**

475. During 1979, The Stationers and Dean Mark had median purchases of $877 and $1186 respectively of Eaton products from Sheaffer Eaton. During the same year, Boise's distribution centers in Seattle and San Francisco had median purchases of $296 and $240 respectively of Eaton products from Sheaffer Eaton (CX 11).

476. During 1979, Yorkship had a median purchase size of $1036 of Duo-Tang products from Sheaffer Eaton. In the same year, Boise's distribution center in Pennsauken had a median purchase size of $892 of Duo-Tang products (CX 12).

477. During 1979, Union, Stimpson, Yorkship, Hanby, and Andrews had median purchase sizes of $331, $688, $369, $268, and $283 respectively from Victor. During the same year, Boise's distribution centers in Boston and Pennsauken had median purchase sizes of $208 and $183 respectively from Victor (CX 13).

478. There are also numerous examples of Boise distribution centers that have purchased less than dealers even on an annual basis.

479. Victor has dealer customers who purchase more than $25,000 per year (Tr. 1607–08). In Victor's fiscal year 1980, eight of Boise's distribution centers purchased less than $25,000. For instance, Boise's distribution center in Boston purchased $5,658 and the distribution center in Salt Lake City purchased $2,206 (CX 320A).

480. In 1979, Sheaffer Eaton had dealer customers who purchased

more than $20,000 of At-A-Glance products (Tr. 1306). In 1979, thirteen distribution centers of Boise purchased less than $20,000 of At-A-Glance products. For example, Boise's distribution center in San Francisco purchased $4,286 and the distribution center in Moonachie purchased $7,278 (CX 279).

481. Rediform has retail dealer customers who purchase more than $25,000 per year (Tr. 859). In 1979, ten Boise distribution centers purchasing from Rediform purchased less than $25,000. For example, the Boise distribution center in Boston purchased $7,179 from Rediform (CX 194).

482. Master Products has dealer customers who purchase more than $12,000 per year (Tr. 1976). In 1979, at least four of Boise's distribution centers purchased less than $12,000 from Master Products. For example, the Salt Lake City distribution center purchased approximately $1,424 from Master Products (Tr. 1894–97).

483. Each of the six manufacturers grant wholesale discounts to their wholesaler customers regardless of the quantity they purchase (Tr. 1600–02, 1127, 1131, 2823–24, 1976–77, 2291–92, 857; CX 310A-B), their size, or the number of their locations (Tr. 857, 2823–24, 1601–02, 1976–77, 2291–92, 1154). [**94**] The testimony of the manufacturer witnesses and the sample transactions confirm the conclusion that the Boise distribution centers received a better discount or lower price than competing dealers whether the centers bought less, the same, or greater quantities of merchandise than did the dealers (CX's 1–6).

2. Boise's Knowledge Of The Absence Of A Cost-Justification Defense

484. None of the six manufacturers ever undertook a written study of the cost of sales or delivery to wholesalers or dealers (Tr. 1154–55, 1607, 857, 2822, 1932, 2292) since they reward wholesalers with lower prices than dealers because of the functions performed by the wholesalers, not because of the amount of merchandise they purchase (F. 460).

485. Boise is aware that it receives a wholesale discount because of the functions it performs, and not because it purchases more than dealers with which it competes:

> JUDGE PARKER: So, again, I'm saying you wouldn't go to a supplier, would you, and tell them that you're entitled to whatever the wholesale discount is if you, in fact, didn't sell to dealers, regardless of how much you bought?
>
> THE WITNESS: Correct (Testimony of Mr. Bazant, Tr. 4894).

486. Thus, it is not surprising that there is no evidence that any of the six manufacturers ever told Boise that the discounts it received

were based on savings realized because of its volume of purchases (Tr. 2824, 1617–18, 860, 2292).

487. Boise's acquisition of office supply dealers also made it aware of the fact that suppliers were granting it a functional discount unrelated to volume. For example, it acquired a Boston dealer, Dennis Office Supply (Tr. 4435–36) which was receiving dealer prices. After Boise meshed its buying practices with those of Dennis (CX 970, p. 124), it is a reasonable inference that it became aware that although the new distribution center's volume of purchases and method of buying from the six manufacturers (Tr. 4443–45) did not differ from when Dennis was given the dealer price, the center immediately qualified for the wholesale discount, a discount which it knew could not be cost-justified.

488. Boise's twenty years of experience in selling to dealers (F. 48) made it aware of the volume of dealer purchases, [95] and a comparison of its own volume of purchases from manufacturers made it aware, or should have made it aware, that in many cases, its distribution centers often purchased no more during the same period of time than did competing dealers.

3. Absence Of A Meeting-Competition Defense

489. The six manufacturers' wholesale discounts have existed, without change, for many years, and they are not limited to particular geographic areas, but are applied nationwide. Rediform has given a discount of 50–20% off of the suggested list price of its business forms to wholesalers for over twenty years (Tr. 816–17, 820–21, 828; CX's 204–05, 196) and a discount of 50–20% off the suggested list price of its Recordplate line since late 1977 (Tr. 817–18, 832; CX's 212–13, 198, 230). Boise and its predecessor have received the discount on business forms since the late 1950's or early 1960's and a 50–20% discount on Recordplate since late 1977 (Tr. 843–44).

490. Master Products' MSW discounts have been the same for some forty years; Boise has been classified as an MSW for discount purposes since at least 1970 (Tr. 1915–17).

491. Most of the discounts used by Bates were in effect when C.E. Williams, its president, began working for the company thirty-five years ago (Tr. 2399, 2184). Boise has been receiving the wholesale discount from Bates as long as it has been a customer (Tr. 2218).

492. Sheaffer Eaton has given wholesalers a 50–20% discount on Duo-Tang since 1968. The discount was inherited from a predecessor (Tr. 1125–26, 1138). It has given a 50–20% discount to wholesalers on At-A-Glance products since around 1974 or 1975 (Tr. 1126). Boise has received wholesale discounts on these products as long as James Gold-

en, a twenty-five year employee of Sheaffer Eaton, has known Boise (Tr. 1128, 1058).

493. Kardex has given wholesalers, including Boise, a discount of 50–10% on visible equipment and supplies since at least January 1979 (Tr. 1579–80).

494. B&P, which sells to all Boise distribution centers at the same discount (Tr. 2895), has given wholesalers, including Boise, a discount of 50–10–5% from its lowest suggested list price for approximately twenty years (Tr. 2734, 2709). B&P also has a net price for wholesalers on some products, known as WQPL. The WQPL prices are generally lower than a price calculated with a 50–10–5% discount from suggested list (Tr. 2745). The WQPL prices existed from around 1975 until 1981 (Tr. 2752, 2747). A very important factor in the creation of the WQPL was competition from Wilson Jones (Tr. 2874). [96]

495. Prior to 1979, the only Boise distribution centers that were classified as wholesalers for discount purposes by Wilson Jones were located in Itasca, Houston, and Dallas. The other twenty-five Boise distribution centers were not classified as wholesalers (Tr. 4870–72). Between 1979 and 1982, Boise's distribution centers in Minneapolis-St. Paul, Tampa, Atlanta, Miami, Charlotte, Nashville, Jacksonville, Milwaukee and Denver also began purchasing at the wholesale price from Wilson Jones. Others did not (Tr. 4870–73; CX's 1025–26). Robert Looney, former Vice-President and General Manager of B&P, did not know whether Wilson Jones sold at the same discount level to all Boise distribution centers during the fiscal year ending April 10, 1980 (Tr. 2895).

4. Boise's Knowledge Of The Absence Of A Meeting-Competition Defense

496. Boise received, and was aware that it received, wholesale functional discounts from the six manufacturers for many years and that over the years, the discounts did not vary. Thus, Boise knew or should have known that the wholesale discounts which it received were given because of the function which it performed, and that the discounts were not granted to meet the prices of the six suppliers' competitors.

5. Absence Of A Changing-Conditions Defense

497. The six manufacturers did not grant Boise the discounts challenged by complaint counsel because the goods it purchased were damaged, obsolete or discontinued (Tr. 2252, 1617, 1924–25, 2821–22, 1146, 844–45).

6. Boise's Knowledge Of The Absence Of A Changing-Conditions Defense

498. Since Boise purchased regularly-stocked items from the six suppliers and its purchases were made continuously over many years, it knew or should have known that the wholesale discounts which it received were not based on the condition of the products which it purchased. [97]

G. *Boise's And The Selected Dealers' Expenses*

1. Boise

499. Boise claims that it undertakes wholesaling expenses in its sales to dealers which would otherwise be performed by the six manufacturers and that under the *Doubleday* theory, the manufacturers' compensation for such expenses, in the form of the price discriminations discussed above, is not illegal under Section 2(a) of the Act (RPF, pp. 243–50).

500. In support of this claim, Boise retained Mr. Richard Bertholdt, partner-in-charge of Price Waterhouse & Company's Chicago office, to review its accounting and other records and to compute the operating expenses incurred in making sales to dealers for the year 1979, the year focused on by complaint counsel (Tr. 4334, 4372–73). Mr. Bertholdt analyzed the operating expenses of Boise's Office Products Division and determined which of those expenses should be allocated to the dealer portion of the Division's business. He then determined which dealer expenses were attributable to Boise's resale of the goods purchased from the six manufacturers (Tr. 4373).

501. Mr. Bertholdt then totalled the expenses incurred by Boise in selling the six manufacturers' products to dealers, and compared them with Boise's "cost of sales" (purchases, Tr. 4409) from each of the manufacturers:

Manufacturers	Cost of Sales	Attributed Expense	Percentage
Bates	[	I.C.	]
B&P	[	I.C.	]
Rediform	[	I.C.	]
Sheaffer	[	I.C.	]
Master Products	[	I.C.	]
Victor	[	I.C.	]
Total	[	I.C.	]

(Tr. 4408–10; RX 310)

502. Dr. Elzinga testified that when Boise competes with dealers there "may be a need" to receive a lower price from a supplier if it

is "providing a service to the manufacturer that the dealer does not provide . . . a need to get a lower price to offset the greater costs that it may incur or greater risks that it might incur. . . ." (Tr. 6160), and Dr. Nevin, complaint counsel's expert witness agreed that to the extent that Boise [98] performs functions for manufacturers which are not performed by dealers, it is entitled to a lower price (Tr. 6989–90); however, according to Dr. Nevin this situation does not exist in the present case (F. 522).

2. The Selected Dealers

503. The selected dealers also incur expenses when they store and resell the products which they have purchased from manufacturers. These expenses, just as does Boise's, reduce the manufacturers' costs of inventorying products (Tr. 1774–75, 2022, 2402–03).

504. In the Boston area, Monroe Stationers has a 60,000 sq. ft. warehouse, 40,000 sq. ft. of which is used to house its office supply inventory of approximately 4,000 items (Tr. 2425–26). G.E. Stimpson Co. has 30,000 sq. ft. of warehouse devoted to the approximately 3,500 items it stocks (Tr. 2907, 2939). Union Office Supply's warehouse is approximately 20,000 sq. ft. (Tr. 2032–33).

505. In the Philadelphia area, A. Pomerantz devotes 66,000 sq. ft. of warehouse to the 8,000 items that it regularly keeps in inventory (Tr. 1336–37), Yorkship carries an inventory of 7,500 items in a 21,000 sq. ft. warehouse (Tr. 2495–96), and Andrews Office Supply in Washington, D.C., has approximately 10,000 to 15,000 sq. ft. of warehouse space for the 5,000 item inventory it carries (Tr. 2602).

506. In Salt Lake City, the Kelly Company has approximately 40,000 sq. ft. of warehouse, of which 13,000 sq. ft. are used for the 5,500 supply items that are normally stocked (Tr. 3975, 3977–78), and Mid-West Office Supply carries 12,000 items in inventory, the majority of which are office supplies (Tr. 3032).

507. In Phoenix, Arizona, Wist Office Supply & Equipment reserves 18,000 sq. ft. of its 40,000 sq. ft. warehouse for office supply items (Tr. 4215–16).

508. In the Seattle, Washington area, The Stationers stocks more than 10,000 items carried in inventory in its warehouse of 24,000 sq. ft. (Tr. 3552–53), and Associated Ruggles has 23,000 sq. ft. of warehouse and stocks 5,000–6,000 items in inventory (Tr. 3142).

509. In Portland, Kilham Stationers has an inventory of 8,000–10,000 items housed in approximately 10,000 sq. ft. of warehouse (Tr. 3663), and Klip Stationers devotes over 10,000 sq. ft. to some 10,000 items carried in stock (Tr. 3238).

510. In the San Francisco area, Gilbert-Clarke devotes 19,000 sq. ft. of its 25,000 sq. ft. warehouse to office supplies [99] (Tr. 3325–26), and

Curtis Lindsay maintains 18,000 items in inventory with warehouse space of approximately 15,000 sq. ft. (Tr. 3894, 3896–97).

511. The dealer witnesses testified that only a small percentage of their sales involved products drop-shipped directly from the manufacturers to the customer (Tr. 1339, 3032, 3326, 3663). In some instances, drop-shipments amounted to 1% or less of the dealers' total sales (Tr. 3239, 3978, 3802–03).

512. Another resale expense which dealers incur is catalogs which are often purchased from wholesalers (Tr. 3894, 3973–74, 3800, 3030, 2493–94, 3237, 3137, 3550–51, 5480; CX's 702, p. 124, 62). Some dealers produce their own catalogs (Tr. 3973–74, 3237).

513. Some dealers provide computer reports of purchases to their commercial accounts (Tr. 1334–35, 2429–30, 3143–44, 4253, 3969).

514. Most dealers also have salespeople who call on accounts regularly (Tr. 48, 1724–25, 2213–14, 5072–73, 2035, 1335–36, 3978–79, 3033, 3803, 3326, 4079, 2912, 3664, 3354–55, 3143, 3239, 4216, 3424, 2427, 2601–02, 2494–95, 3895). Statistics gathered by the trade association NOPA indicate that 85% of all dealers employ outside salespeople, typically three, and 94% of dealers with volumes over $1 million employ outside salespeople, typically five (CX 356, pp. 11, 19).

3. Trade vs. Functional Discounts

515. I have used the term "functional discount" in this decision to describe the pricing practices of the six manufacturers, but Drs. Elzinga (Tr. 6408) and Nevin[10] believe that this term is often used to describe two different pricing schemes and that a distinction should be made between the two, using the terms "functional discount" and "trade discount."

516. Dr. Nevin testified that the terms "functional discount" and "trade discount" are not consistently used in business and marketing literature (Tr. 6840–41) but he believes that the distinction between the two terms is important in this case (Tr. 6873–74). [**100**]

517. A trade discount is one which is given to marketing intermediaries at a level of trade because they are at that level of trade. This discount is based on who the marketing intermediary resells to, and is completely independent of the marketing functions performed by the intermediary. For example, a manufacturer may define wholesalers as marketing intermediaries who resell to dealers and provide all wholesalers an additional discount which is not given to the dealers. The discount received by the wholesaler is a trade discount (Tr. 6843–44; CX 2101).

[10] Dr. Nevin is a professor of business at the Graduate School of Business, University of Wisconsin, Madison. His area of specialization is marketing; within this area, he specializes in "marketing management" and "channels of distribution" (Tr. 6832–33; CX 2100).

518. In comparison, a functional discount rewards a marketing intermediary for assuming and performing a function that would otherwise be performed by that manufacturer (Tr. 6850).

519. Dr. Nevin testified that if a manufacturer decides to offer a functional discount, it should be offered to any marketing intermediary that performs the function, regardless of the level of trade which the intermediary occupies. Thus, if a dealer and dual distributor perform the same function (*e.g.*, carrying inventory) they should both receive the same discount (Tr. 6859–61). Dr. Elzinga, in effect, supported Dr. Nevin's argument by agreeing with the following quote from an article discussing functional discounts:

> On the other hand, to say that two buyers who perform the same services and buy in the same quantities should, on grounds of efficiency, receive different discounts solely because they resell to different customers also is nonsense (Tr. 6400).

520. Dr. Elzinga also concluded that while he might "quibble" with the nomenclature, he recognized that:

> [T]here are entities in the office products distribution chain, call them contract stationers, or commercial stationers in [the Kearney Report's] parlance, that in a functional sense do some or all of the things that wholesalers do. That is, they buy in large quantities, they hold inventory, they break bulk (Tr. 6423).

521. Dr. Nevin testified that when dealers buy directly from manufacturers, the dealers incur a large portion of the costs which wholesalers incur when dealers buy through the wholesalers. In other words, dealers may hire purchasing agents to go through the numerous manufacturers' catalogs and price [**101**] lists, contact them and place the orders, etc. Alternatively, dealers may buy through wholesalers who will perform those functions for dealers and dealers will pay wholesalers for those costs as they will be included in the price paid to the wholesalers by dealers for the goods. In either case, the manufacturer does not incur those costs (Tr. 6930–31, 6949–50).

522. Based on his review of portions of the record, Dr. Nevin "Basically . . . found the dealers performing the same marketing functions that Boise performs in their sales to commercial users," a conclusion with which I agree (F.'s 70, 503–14). A document which he reviewed was the Kearney report which was prepared for Boise by the management consulting firm of A.T. Kearney & Co. (Tr. 6863). As Dr. Nevin stated:

> In the Kearney report they essentially talked about the marketing functions that were performed by a variety of different marketing intermediaries in the channel. I remember that the Kearney report indicated that commercial stationers, which are in essence

dealers, performed the same functions with respect to selling to commercial users that Boise performed (Tr. 6864).

523. Referring to the six manufacturers, Dr. Nevin testified that since Boise operates as a dual distributor it is entitled to receive the trade or wholesale discount on sales it makes to dealers but that it is not entitled to receive the wholesale discount on sales it makes in a dealer capacity directly to users (Tr. 6871), because he does not believe that any party should have a competitive advantage imposed on it externally which it has not earned. Thus, if two resellers sell in the same way, they should have access to the same goods at the same price (Tr. 6872). **[102]**

III. Conclusions of Law

A. *The Manufacturer's Sales To Boise And The Selected Dealers Were Contemporaneous And Discriminatory*

Complaint counsel's charts establish that the six manufacturers, by granting Boise substantial wholesale functional discounts which were not given to competing dealers, discriminated in price between these customers for a substantial period of time.

Of course, a manufacturer does not continue offering the same price to customers; prices change regularly, and because they do, one must be able to conclude, before a finding of discrimination is made, that the prices analyzed (or under Sections 2(d) and (e), advertising payments or facilities) are comparable. For example, if a manufacturer charges customer A one dollar for a product on January 1 and another customer fifty cents for the same product on December 31, it must be shown that the price difference is discriminatory and not the result of some intervening, and lawful, circumstance such as a lowering of price by fifty cents to all customers on December 31. If such pricing were considered discriminatory, sellers would be unable to adjust their prices in response to competitive pressures. *Atlanta Trading Corp. v. FTC*, 258 F.2d 365, 371–72 (2d Cir. 1958) (§ 2(d) allowance); *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F.Supp. 608, 610–11 (S.D. Cal. 1963); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968):

> A substantial time interval indicates only that different prices might have been caused by different market conditions, rather than by an accomplished intent to discriminate. *Id.* at 357.

As Rowe in his *Price Discrimination Under The Robinson-Patman Act* 50 (1962) puts it:

While in the serene sales context of the atomic reactor market even a price differentiation some months apart might create a cognizable discrimination, goods whose prices shuttle in rapid trading or competitive bidding may not do so even if the different prices are quoted only a few days apart. [103]

The office product market is more like the former than the latter situation. The comparisons in complaint counsel's charts are not of "trivial sales isolated in time," *Atlanta,* at 372, but of continuous sales made pursuant to an established policy under which Boise was granted a wholesale functional discount on the manufacturer's regular goods, and under which competing dealers invariably received a smaller discount. Under these circumstances, I conclude that the 1979 sales analyzed in complaint counsel's price charts were contemporaneous and may be compared to determine whether the manufacturers charged discriminatory prices.[11] *Century Hardware Corp. v. Acme United Corp.,* 467 F.Supp. 350, 354 (E.D. Wis. 1979).

A comparison of the manufacturers' contemporaneous sales to Boise and the selected competing dealers reveals that they regularly granted wholesale functional discounts to Boise which were unavailable to the dealers, and which resulted in discriminations in the price paid for their goods as between the favored customer, Boise, and the unfavored, competing selected dealers.

Boise urges, however, that even assuming it and the selected dealers paid different contemporaneous prices, complaint counsel have failed to prove that the goods whose prices are compared in the charts were sold by its seven distribution centers to commercial accounts or that the dealers sold those goods in [104] competition with Boise to commercial accounts and not from their stores (RPF, pp. 209–10). I disagree. Given the substantial sales to Boise and the selected dealers, and the substantial sales by the selected distribution centers to commercial accounts (F. 61), the only possible conclusion is that Boise and the dealers competed in the resale of the goods described in the chart. *See Tri-Valley,* at 1174.

[11] Where customers make regular purchases to maintain their inventory, it seems to me that contemporaneous sales are inevitable. Thus, even if there were price changes during the period of comparison, to find that no sales were contemporaneous one would have to infer that all sales were made to Boise before (or after) the price change and that no other sales were made to the selected dealers when sales were made to Boise. *Compare Tri-Valley Packing Ass'n.,* 60 F.T.C. 1134 (1962), *rev'd on other grounds,* 329 F.2d 694 (9th Cir. 1964), in which respondent argued that it was possible that all of its private label goods were resold by retailers only in stores which did not compete with the favored customer and not in stores which did. The Commission stated:

> In so arguing, respondent is in effect saying that there is some likelihood that hundreds or thousands of items which have been commingled with a greater or lesser number of like items could be segregated by accident or chance. It would not be an overstatement to say that it would be virtually impossible for this to happen once, and respondent would have us believe that it happened on several occasions. *Id.* at 1174.

B. *Boise And The Manufacturers Have Been And Are Now Engaged In Commerce And Boise's Purchases Were And Are In Commerce*

Section 2(a) of the Robinson-Patman Act ("the Act") outlaws price discrimination by a person "engaged in commerce . . . where either or any of the purchases involved . . . are in commerce. . . ."

At least one of the transactions involved in a Section 2(a) case must, therefore, cross state lines, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Section 2(f) of the Act adds an additional requirement; that a buyer who is "engaged in commerce" must also have received a discriminatory price "in the course of such commerce."

Many of the 1979 sales by the six manufacturers to the Boise distribution centers and the selected dealers crossed state lines (F. 95, n. 2) and the manufacturers and Boise were thus engaged in commerce, and the former's sales and Boise's purchases were made in the course of commerce (F.'s 51, 108–13, 163–64, 223, 253–59, 292, 342).

Not all of Boise's purchases in the period of time covered by the price comparison charts crossed state lines; some were intrastate, but complaint counsel argue that these purchases satisfy Section 2(f) because they also occurred in the course of commerce.

These intrastate purchases include ones made by Boise's Pennsauken, New Jersey distribution center from the B&P, Rediform and Bates facilities located in New Jersey, and their resale in competition with selected dealers located outside of New Jersey (Hugh A. George, Hanby, Andrews and Pomerantz) (F.'s 96, 108–09, 253–54, 292).

Complaint counsel argue that while the "in the course of such commerce" language of Section 2(f) could be read strictly to require an interstate purchase by the buyer, this interpretation could lead to the "incongruous result that the seller could be [**105**] held liable for a discriminatory sale to an intrastate buyer[12] but the knowing buyer could not be held liable" (CPF, p. 122).

Since Section 2(f) liability derives from Section 2(a) liability, it would defeat the purpose of the Act to exculpate the buyer in a situation in which the discriminating seller could be held liable. Since Boise is "engaged in commerce" because of its many interstate purchases and sales and since the competing dealers' purchases are interstate, it is reasonable and does no violence to the statutory purpose to find an interstate involvement in such a situation even though Boise's purchases were intrastate. Rowe at 437:

[12] Because one sale—to a competing dealer outside of New Jersey—would have been made in interstate commerce.

To harmonize the seller's and buyer's liability in the identical transaction, courts may nonetheless construe the text of Section 2(f) to reach even such an "intrastate" buyer in a discriminatory local purchasing transaction with an "interstate" seller. . . .

The second set of intrastate transactions involves sales to Boise distribution centers and to competing dealers by manufacturers located in the same state. These include purchases from B&P and Rediform by Boise's Moonachie, New Jersey and Brisbane, California locations, as well as purchases by Boise's Pennsauken, New Jersey location from B&P and Rediform when the comparative sale was to Yorkship, a New Jersey dealer (F.'s 96, 109, 254).

Boise's purchases in these situations were also made "in the course of commerce," according to complaint counsel, because the products sold to Boise by B&P and Rediform were in the flow of commerce. Alternatively, complaint counsel argue that Boise's purchases meet the jurisdictional requirements of the Act because they coexist with other interstate sales arising from the same pricing practice (CPF, pp. 124, 126).

The latter argument derives from *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.), *cert. denied*, 103 S.Ct. 57 (1982), where the court held that since some interstate discriminatory transactions were involved, it was proper to consider the legality of intrastate sales by ITT:

Since the price disparity between advertised and private label bread, about which Inglis [106] complains, was represented by some interstate sales, we affirm the district court's holding that it had jurisdiction to examine that same price disparity as it existed with respect to sales of the same products within California. *Id.* at 1044.

The "flow of commerce" argument is based on the origin of the products which are sold by the New Jersey and California locations of B&P and Rediform. Rediform distributes its products in California through its Los Angeles facility (F.'s 108–09) and obtains the products sold there from its parent's manufacturing plants in Oregon, Utah, Pennsylvania and Indiana (F.'s 110, 112). Products were sold in New Jersey from Rediform's Paramus facility, but they were obtained from its parent's plants in New York, Pennsylvania, Indiana and Kentucky (F.'s 110–11). B&P's facilities in Los Angeles serve customers located in California and its Elizabeth location serves customers located in New Jersey (F.'s 253–54). With the exception of heat seal products, those products sold in California were manufactured by B&P outside of that state as were those sold in New Jersey to Boise's Moonachie and Pennsauken centers (F.'s 256–58).

Since the products sold by B&P and Rediform were warehoused for further distribution to its customers, their coming to rest in New

Jersey and California interrupted but did not "necessarily terminate their interstate journey." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943).

In *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), the Court interpreted the reach of the "in commerce" language of the Robinson-Patman Act, and discussed the applicability of *Walling*. It held that the flow of commerce might cease after a sale by an interstate seller to a local distributor, but that it did not do so when an interstate seller brought goods from out-of-state for intrastate distribution by its own in-state facility. *Id.* at 237–38, n. 6. *See also Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 677 (5th Cir.), *cert denied*, 382 U.S. 959 (1965); *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868, 870 (5th Cir.), *cert. denied*, 379 U.S. 903 (1964).

Like the sellers in *Standard Oil, Foremost* and *Hardrives*, Rediform's and B&P's facilities in New Jersey and California were designed to facilitate the flow of goods produced in other states to New Jersey and California customers, and the storage of products in those facilities did not interrupt the flow of commerce. In addition, these intrastate sales, as in *Inglis*, were an adjunct to, and the result of, the decision by the manufacturers to grant Boise a wholesale discount throughout the United States, and their intrastate sales cannot be viewed as distinct from their interstate sales. Thus, the sales to Boise and the New Jersey and California dealers were made in commerce **[107]** and Boise's purchases from facilities in these states were made in the course of commerce.

C. The Commodities Sold By The Manufacturers At Discriminatory Prices To Boise And The Selected Dealers Were Of Like Grade And Quality

Section 2(a) of the Act makes it unlawful "for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality. . . ." This language has led to complicated and sometimes inconsistent analyses of the comparability of products which differ in physical makeup or brand identification. Rowe, *supra*, at 66–73, but the summary of then-existing law contained in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) provides a good working definition which can be used to determine whether products sold at different prices are comparable:

> Actual and genuine physical differentiation between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act. *Id.* at 158.

See also Quaker Oats Co., 66 F.T.C. 1131, 1192 (1964) (products are not comparable "if there are substantial 'physical differences . . . which affect consumer preference or marketability. . . .' ").

Since the manufacturers offer Boise and the selected dealers products under the same brand, the "like grade and quality" issue arises only when the charts compare products which are physically different.

No problem of comparability exists when physically identical products are sold to the favored and unfavored customer, and the charts do contain such comparisons on a number of products (F.'s 269–71, 123–25, 178, 308, 339, 355–56). In other cases, the charts compare prices of a substantial number of products which fulfill the same function but vary in size, color, or format (F.'s 120–37, 139–41, 176–83, 185–87, 233–35, 305–06, 311–12, 314–15, 317–18, 320–21, 349–50, 352–53, 358–59). Since the variations in the latter class of products do not affect consumer preference or marketability, *Quaker Oats,* they are of "like grade and quality" and their prices may properly be compared for purpose of analyzing the extent to which Boise has been favored and the competitive impact of that favoritism. **[108]**

Some of complaint counsel's price comparisons may not match identical or similarly functional items but they claim that "the Act does not require that the plaintiff match products purchased on an item-by-item basis" (CPF, p. 131). The case law supports their claim, for "the courts have long held that goods need not be individually identified but need merely be part of the same line in order to be considered of 'like grade and quality.' " *Holiday Magic, Inc.*, 84 F.T.C. 748, 994 (1974) (initial decision).

The leading case recognizing this approach to the "like grade and quality" issue is *Moog Industries, Inc. v. FTC,* 51 F.T.C. 931 (1955), *aff'd,* 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam,* 355 U.S. 411 (1958). Moog was a manufacturer of three lines of replacement parts—leaf springs, coil actions, and piston rings—which sold them pursuant to annual volume rebates. A different rebate was given on each line and the rebate was computed on the basis of total annual purchases. 51 F.T.C. at 945–46.

Deciding that the products sold by Moog were of like grade and quality, the Commission emphasized that "respondent's customers do not purchase respondent's products as individual items. . . ." but as "part of a line designed to supply the needs of garages. . . ." and that the rebates "were not granted on the basis of the individual items purchased but on the basis of the total dollar purchases of a particular line." The Commission also found that Moog's customers carried substantially all of the items in a particular line. 51 F.T.C. at 949.

In affirming the Commission, the court stated that where:

[A] discriminatory rebate is paid upon all items in a line, the Commission may properly find that such items are "sufficiently comparable for price regulation by the statute."

The court went on to state:

[T]he question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the [**109**] line, whether exactly alike and interchangeable or not. 238 F.2d at 50.

By denying that the like grade and quality concept did not arise, the court recognized that since all products in a particular line were bought, or could be bought, it was inevitable that price discriminations as to each product in the line would occur; thus, there was no need to become involved in minute examinations of comparability. *See Continental Banking Co.*, 63 F.T.C. 2071, 2109 (1963) (initial decision).[13]

The same principle applies in this case. The manufacturers sell lines of products, and the purchasers buy these lines to maintain an inventory from which their customers choose those products which they need. While the prices of different products within a line may differ, the manufacturers grant different discounts to wholesalers and dealers on a broad line of products and Boise consistently receives a greater discount, and thus pays a lower price on *all* products in each manufacturer's line when compared with the selected dealers. Thus, the six manufacturers' lines of products are, as in *Moog*, of "like grade and quality." The further proof that Boise and selected dealers purchased identical or functionally similar products was thus unnecessary; however, it did establish that *Moog's* reasoning is correct: Where a manufacturer sells a line of products to all customers, it is inevitable that both favored and unfavored will buy identical or similar products within the line.

D. *The Discriminations In Price May Injure, Destroy, Or Prevent Competition*

Under Section 2(a) of the Act, only those discriminations in price are unlawful whose effect:

[M]ay be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either

[13] In fact, the court in *Moog* expressly held that the Commission was correct in rejecting evidence offered by respondent that products bought by particular purchasers "were not uniformly for the same make, model and age of automobile." 238 F.2d at 50.

grants or knowingly receives the benefit of such discrimination, or with customers of either of them. [110]

Because the Act uses the word "may," courts and the Commission have held since its passage that where the effect of a price discrimination on competition between buyers is an issue, "the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality. . . ." *Tri-Valley,* at 1171; *FTC v. Morton Salt,* 334 U.S. 37, 50–51 (1948); *J. Truett Payne Co. v. Chrysler Motors Corp.,* 451 U.S. 557, 562 (1981) ("As our cases have recognized, the statute [§ 2(a)] does not 'require that the discriminations must in fact have harmed competition.' ");[14] *Falls City Industries, Inc. v. Vanco Beverages, Inc.,* 103 S.Ct. 1282, 1288 (1983) ("for purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.") Furthermore, the substantial difference in price need not affect a significant part of the products purchased by the unfavored customer. *Morton Salt* at 49.

Whether a price discrimination is substantial has been determined traditionally by analyzing the competitive vigor of, and the average net profits, in the industry in which the discrimination occurs. In *Moog,* the court found that discounts of up to 19% in a keenly competitive environment where profits were low was substantial. 238 F.2d at 51. In *United Biscuit Co. v. FTC,* 350 F.2d 615, 621 (7th Cir. 1965), the court agreed with the Commission that "considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6% . . . was clearly substantial." *See also, Kroger Co. v. FTC,* 438 F.2d 1372, 1379 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971); *National Dairy Products Corp. v. FTC,* 395 F.2d 517, 522–23 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *Foremost Dairies, Inc. v. FTC,* 348 F.2d 674, 680 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965); *Mueller Co. v. FTC,* 323 F.2d 44, 46 (7th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964); *Standard Motor Products v. FTC,* 265 F.2d 674, 676 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959); *E. Edelman & Co. v. FTC,* 239 F.2d 152, 154 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958); *Whitaker Cable Corp. v. FTC,* 239 F.2d 253, 254–55 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957).

Since complaint counsel are not required to prove that a price discrimination has in fact adversely affected competition, diversion of trade to the favored customer need not be proved, and the inference of injury is sustainable even if unfavored customers insist that they have not been injured for "A witness cannot be allowed by conclusion

[14] The Court in *Truett Payne* distinguished between Commission suits under Section 2(a) and private suits and found that in the latter, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* at 562.

to deny a mathematical fact," [111] *i.e.*, that he was injured by paying substantially more for the same goods than his favored rivals. *Moog* at 51.

Underselling competitors is one way that a favored purchaser may use lower prices, but this is not the only way that such an advantage may be used to injure his competitors. *E. Edelman & Co.* at 155; *Foremost Dairies, Inc.* at 680; *Kroger Co.* at 1378–79; *National Dairy Products Corp.* at 522:

> [I]njury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers.

Boise employees and dealer witnesses testified to the intensely competitive nature of the office products industry (F. 408) and this conclusion is confirmed by evidence of the continual shifting of accounts from the unfavored dealers to Boise and from Boise to the dealers (F.'s 384–422). Net profits of the selected dealers and of other dealers in the industry are low (from 3–4%)[15] (F.'s 423–30), much less than the price advantage enjoyed by Boise on its substantial and sustained purchases,[16] from the six manufacturers (from 5–33%) (F.'s 313, 237), and Boise has used its advantage to underprice its competitors on occasion or to offer better services than its competitors (F.'s 384–406). Finally, Boise has enjoyed its price advantage on very substantial purchases from the six manufacturers (over $10 million in 1979) (F.'s 145, 192, 239, 274, 324, 362).

The dealers have also underpriced Boise at times (F.'s 409–22), but they have had to do so in the face of its substantial price advantage, so that when a dealer lured a customer away from Boise, its success was accompanied by a significant impairment of profits.

Considering these facts, the only possible inference is that the effect of the substantial and sustained price discriminations favoring Boise may be to destroy or prevent competition with the unfavored dealers and I so find. *See E. Edelman* at 155: [112]

> [T]he competitive opportunities of the less favored purchasers were injured when they had to pay substantially more for petitioner's products than their competitors had to pay.

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[15] Net profits are the true measure of dealer success (CRB, pp. 64–68), and I reject Boise's claim that only gross profits of privately-held companies should be considered (RRB, p. 53).

[16] Which distinguishes this case from *American Oil Co. v. FTC*, 325 F.2d 101, 106 (7th Cir 1963) (RPF, pp. 215–19).

E. *The Inference Of Competitive Injury Has Not Been Rebutted*

1. Introduction

In an *amicus* brief filed in *Truett Payne* the Justice Department and the FTC supported the *Morton Salt* injury standard subject to rebuttal evidence,[17] *Brief For The United States As Amicus Curiae* 9, n. 7, and Boise argues that any inference of injury has been rebutted by evidence that the disfavored dealers' businesses (as well as that of the whole industry) have flourished, that the lower prices which it enjoyed are available to the dealers, and that any advantage it may have is justified by the resale functions which it performs.

2. Dealer Success Does Not Negate The Inference Of Competitive Injury

Although I have found that the price differences summarized in the charts were substantial, Boise claims that they could not have been "competitively substantial" (RPF, p. 216) since the total number of dealers in the office products industry has increased over the past five years (F. 47), the selected dealers' sales from 1977–1980 increased an average of 22% (F. 431) and accounts lost to Boise were counterbalanced by accounts which Boise lost to the dealers (F.'s 433–34). **[113]**

Boise's emphasis on the apparent lack of effect of the discriminations on market structure is not appropriate in a Robinson-Patman case. This approach has not been adopted in the case law, and it ignores the language of the Act. *See,* Posner, *The Robinson-Patman Act, Federal Regulation of Price Differences,* 38–40 (1976):

> For secondary-line price discrimination, the most critical issue in the interpretation of section 2(a) is what is to be required in the way of proof of competitive injury. The polar extremes are (1) to regard a price difference itself as conclusive evidence of anticompetitive effect, on the ground that any firm that pays more than its competitors for goods that it is trying to resell in competition with other firms is at a competitive disadvantage, and (2) to require, as in merger cases brought under the amended section 7 of the Clayton Act, proof that the discrimination is likely to create or contribute to an anticompetitive market structure. The first pole seems untenable in that it reads the competitive-injury requirement right out of the statue. The second may be objected to as giving no weight at all to the "destroy or prevent competition" clause of the competitive-injury standard, a clause that has no counterpart in the other sections of the Clayton Act and was apparently added to section 2(a) in an effort to create a standard of illegality stricter than the normal Clayton Act standard.

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[17] *See Purolator Products, Inc.,* 65 F.T.C. 8 (1964), *aff'd,* 352 F.2d 874 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968):

> In the context of this case, therefore, where the evidence shows a highly competitive market with narrow profit margins, we conclude that complaint counsel has established . . . a prima facie case of competitive injury. . . . If not rebutted, it is our opinion that this showing is sufficient to establish the above-stated requirement of a likelihood of competitive injury. *Id.* at 28.

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Requiring the commission to prove a persistent and systematic price difference, as in the *American Oil* case, is in principle a method of distinguishing between discrimination that results from the exercise of monopoly power and discrimination that occurs in the process of adjusting to a new equilibrium. Arguably, the first sort of discrimination should be prohibited while the second should surely be permitted and indeed encouraged. Since the former is systematic, and the latter sporadic, an interpretation of the competitive-injury standard of section 2(a) that limited its reach to systematic price discrimination might narrow the act to practices that there is at least some economic basis for condemning. Thus the principle of the *Morton Salt* case [114] as reinterpreted in the *American Oil* case represented an important step toward bringing section 2(a) into line with the economic analysis of price discrimination.

Applying the correct Robinson-Patman standard, it is inconceivable that the substantial and sustained price differences documented in this record can have had no substantial effect on the ability of the dealers to compete with Boise. It is true that their businesses have grown, but their growth would have been even greater, and their profits would have increased substantially if they had enjoyed the pricing which the six manufacturers extended to Boise. It is the purpose of the Act, I believe, to ensure that equally efficient competitors who buy in similar amounts should start off on a relatively equal footing, and that one class of customers should not be handicapped by being forced to pay substantially more than another for the same regularly-purchased goods. That has not been the case up to now. The selected dealers have, for no economically sound reason, been forced to pay much more for the same goods than has Boise, and it would be a perversion of the Act to hold that these substantial price differences are lawful because the dealers' businesses have not been destroyed by them. The extent of their success in the face of these price discriminations is a testimony to their business acumen and establishes that they are as efficient, and perhaps more efficient, than Boise. Rewarding Boise by allowing it to receive the wholesale discount when it competes with dealers would, in effect, reward inefficiency.[18]

3. The Prices Which Boise Enjoys Are Not Available To The Selected Dealers

According to Boise, any injury to the selected dealers could have been avoided since the lower prices which it enjoyed were also available to them because: (1) If they perform wholesale functions, as does Boise, they are entitled to the wholesale discount; (2) Discounts equal to the wholesale discounts on large purchases, and discounts on private label goods, are available; (3) Buying groups and cooperatives can obtain wholesale discounts; and (4) Competitors of the six manufac-

[18] Boise's proposed findings agree that "dealers have competitive advantages over Respondent" [*i.e.*, they are more efficient] (RPF 388–89).

turers offer dealers the same or greater discounts as Boise now obtains (RPF, pp. 211–12).

Boise's claims are both factually and legally incorrect. Some dealers asked the manufacturers for Boise's wholesale [**115**] discount; they were turned down (F. 448). The charts reveal that Boise paid much less than did the selected dealers for the same goods even when it purchased less than the dealers, and Boise's lower prices were in fact not available to the dealers, for if they were truly available, the price differences revealed in the charts would not exist. Some private label goods are available, but seller's label goods are desirable to the trade (F.'s 435–45), and the dealers should be able to obtain fair pricing on goods which they choose to resell; they should not be forced to seek out lower-priced goods from competitors of the six manufacturers or purchase products which do not have the same consumer appeal. In any event, there is absolutely no evidence that resorting to alternative sources of supply or to private-label merchandise would permit the dealer to enjoy Boise's price advantage on the same kind of goods which both now purchase.

Finally, while there are a few buying groups in the office products industry, the selected dealers cannot obtain all of the six manufacturers' products at the wholesale discount by joining such groups (F.'s 456–59). In any event, the Commission has rejected this "solution" to price discrimination. *See Dayton Rubber Co.,* 66 F.T.C. 423, 470–71 (1964), *rev'd on other grounds sub nom. Dayco Corp. v. FTC,* 362 F.2d 180 (6th Cir. 1966):

> It is argued that the non-affiliated jobbers could join or form group buying associations of their own and thereby obtain the more favorable prices. As a result, the lower prices were "available" to all, thus obviating any finding of price discrimination, it is urged. We reject this argument. Lower prices are not "available" where a purchaser must alter his purchasing status before he can receive them. Patently, a lower price is not "available" to a merchant who must, in order to qualify, purchase more goods within a given time period. The same consideration applies here.

Although Boise cites later cases which it believes favor its position, these cases recognize that Dayco still represents the law on availability. For example, *FLM Collision Parts, Inc. v. Ford Motor Co.,* 543 F.2d 1019 (2d Cir. 1976), *cert. denied,* 429 U.S. 1097 (1977) merely states the obvious: that the lower price must be available "not only in theory but in fact." *Id.* at 1025. In fact, the lower prices which Boise enjoys are not available to the selected dealers. And, in *Shreve Equipment, Inc. v. Clay Equipment Corp.,* 650 F.2d 101 (5th Cir.), *cert. denied,* 454 U.S. 897 (1981), the court held that a discount was available, but only because the purchaser "did not have to alter its independent purchas-

ing status to receive the discount, as was the case in *Dayco*." *Id.* at 107. [116]

The discount structures employed by the six manufacturers are designed to reward wholesalers for the functions which they perform and to prevent dealers from obtaining the wholesale discount despite their performance of equivalent functions (F. 522), and this structure ensures that the wholesale discount is *not* available to dealers who compete with Boise.

4. The Lower Prices Which Boise Enjoys Are Not Justified By Its Resale Expenses

If Boise did not resell some of the products on which it receives a wholesale functional discount in competition with dealers who pay higher prices, its practices would not be subject to the prohibitions of the Act. *Doubleday & Co.*, 52 F.T.C. 169, 207–08 (1955).

Since Boise is a dual distributor and does compete with the dealers, however, traditional R-P doctrine ignores its functional status. The only relevant consideration is that it competes with dealers, yet pays lower prices for the same goods than they do:

> [I]n the Ruberoid case, the Supreme Court stressed that actual competition in resale rather than nomenclature is decisive, and approved the Commission's disregard of "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers." Rowe at 177.

In *Purolator Products, Inc.*, respondent granted a 4% redistribution discount to warehouse distributors (WDs) with branches; those without branches did not receive the discount. Cost studies which indicated that it cost WDs with branches more than 4% to redistribute the products were introduced to show that no competitive injury was suffered by WDs without branches. The Commission rejected this proof:

> By granting to those distributors who reship to their branches a discount, respondent is, in effect subsidizing their internal operation. Funds normally used for internal reshipment are released for use elsewhere. Thus, by making available this discount, respondent is granting to the favored distributors a competitive weapon which they would not otherwise receive. We are not of the opinion that such price discrimination may be excused by proof that the buyer receiving the more favorable price has higher internal [117] expenses than his competition. 65 F.T.C. at 29.

The only Commission case which rejects the traditional refusal to consider functional status is *Doubleday & Co.* There, the Commission stated that:

> [T]o relate functional discounts solely to the purchaser's method of resale without

recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed.

The Commission warned, however:

Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. 52 F.T.C. at 209.

The Commission overruled *Doubleday* in 1962. In *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), regular jobbers received a 15% discount and stocking jobbers received one of 25%. The extra 10% discount compensated stocking jobbers for services not performed by regular jobbers and therefore did not injure the latter class of customers, according to respondent. The Commission rejected this argument because it "ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller;" in that case, the ability to serve their customers better because of their warehouses. *Id.* at 127.

The contradictory theories of *Doubleday* and *Mueller* would ordinarily have no significance in this case since *Mueller* states the law regarding the payment for services rendered by a buyer. However, when the Commission issued the present complaint, I was directed "to enter findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics." [118]

To that end, I received in evidence a study undertaken by a Boise consultant to determine its cost of sales to dealers. This study finds that Boise incurred operating expenses in 1979 totalling [I.C.] in making sales of the six manufacturers' products to dealers, or [I.C.] of its total cost of purchases from them in 1979 (F. 501). Complaint counsel present extensive arguments that this study should not be relied upon (CRB, pp. 117–28), the most convincing being the significant discrepancy between the actual 1979 net profits of several distribution centers which concentrate on wholesale sales and Boise's net profit on wholesale sales if the study's basic assumptions are used to calculate that figure (CRB, pp. 122–23).

The most serious flaw in the study is not its shaky methodology, however, but its failure to address the issue posed by *Doubleday*, (assuming for the moment that its legal theory is sound). Doubleday's defense was that the wholesalers who received extra discounts were

being compensated for services they performed and which were *not* performed by the unfavored customers, 52 F.T.C. at 199–200, and the Commission's acceptance of this argument was based on this assumption. This situation—that the favored buyer performed resale functions which the unfavored did not—is absent here. Dr. Nevins concluded from his reading of the record that the dealers perform the same functions as Boise and a report prepared for Boise reached the same conclusion (F. 522). Mr. Bertholdt's study does not, therefore, answer the central question in *Doubleday,* for it assumes that all of the costs Boise incurred were unique—*i.e.,* that the unfavored dealers experienced *no* distribution costs.[19]

However, even if all of the problems in Boise's study were swept aside, and even if it performed distributional functions which the dealers do not, I would ignore the *Doubleday* theory and find, as the Commission did in *Mueller,* that a price discrimination cannot, as a matter of law, be justified as a "reward" to the favored dual-function buyer.

The *Mueller* approach is not, in my opinion, "profoundly anticompetitive" as Commissioner Pitofsky concluded when he dissented from the issuance of this complaint. Commissioner Pitofsky assumes that if *Mueller* is the law, dual-function buyers will abandon certain services for which they are receiving compensation. I believe these fears are misplaced, for *Mueller's* assumption is correct: the services offered by any buyer—Boise or a dealer—are not performed as a favor to the seller but because they benefit the buyer by satisfying the needs of its [119] customers. If Boise is forced to forego the wholesale discount on sales it makes in competition with dealers, it may decide to abandon those sales, but dealers will take its place and, given the fragmented nature of the industry, there will still be vigorous competition in sales to commercial accounts.

On the other hand, if *Doubleday* were the law, I believe that it would permit a reward where none is earned. A favored buyer's competitive advantage is not "used up" when he is compensated for unique services, for the buyer furnishes those services because it is to his competitive advantage. I do not believe it is procompetitive to allow a seller to buy an advantage for a customer because it has chosen voluntarily to undertake certain resale functions.

In summary, because its resale functions are not unique, Boise's significant price advantage cannot be justified by resort to the *Doubleday* theory (F.'s 519–20, 522). Furthermore, even if Boise provided services which are not provided by dealers, I would find, in accordance

[19] Boise argues that its cost of selling to dealers "consumes" any difference in price (RRB, p. 88); however, Boise is still favored for it is being reimbursed by the six manufacturers for those costs, whereas the dealers, who perform the same functions, are not since they are paying a higher price for the same goods.

with *Mueller,* that it should not receive discriminatory compensation for those services; otherwise, Boise would be receiving an unwarranted competitive advantage for performing services which benefits it.

F. *The Discriminations In Price Were Not Cost-Justified*

Complaint counsel's burden of proving that the different prices charged by the six manufacturers to Boise and the selected dealers were not cost-justified has been met even though they have not offered a formal cost study. Such a study is not required, *Suburban Propane Gas Corp.,* 73 F.T.C. 1269, 1273 (1968); *Fred Meyer, Inc. v. FTC,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), for, given the facts of this case, a formal cost-study would have been superfluous.[20] **[120]**

The price differences detailed in this record could have been cost-justified if the differences in the six manufacturers' costs of manufacture, sale or delivery resulting from different quantities or methods in selling to Boise and the selected dealers had equalled or exceeded the differences in price paid by Boise and the dealers, but given the large price disparities—up to 33%, there would have to have been a great difference in such costs. These differences simply did not exist in 1979 or any other period of time.

That these differences do not exist is evident from the way the manufacturers viewed the discounts which they gave Boise. It is true that some testified that the difference in the prices which they charged Boise and the dealers were based on cost differences (RPF 143–49) but their conclusory and undetailed testimony was to be expected, for this was the first time they had to account publicly for such large price discrepancies.

Since under the six manufacturers' pricing policies, wholesalers receive a larger discount than dealers regardless of the quantities purchased (F. 483), the manufacturers were pricing by function, not in recognition of differences in the cost of selling to Boise and dealers. Indeed, most manufacturers have separate quantity discount schedules (F.'s 9–10), a further indication that the discounts which are challenged here were not adopted because of cost savings, as is the fact that none of the manufacturers have undertaken studies to determine if their functional discounts were cost-justified (F. 484).

Turning to specifics, complaint counsel have established that there are no significant differences in the methods by which the manufac-

[20] That the Commission did not prove the costs of the suppliers is immaterial. Costs surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an *unsuspecting recipient* of prohibited discriminations." *Fred Meyer* at 364 (emphasis in original).

turers make, sell or deliver their products to Boise and the dealers. The products sold to Boise and the dealers are stock items; they are not specially made for Boise (F. 462). The manufacturers sell their products by dealing, not with headquarters, but with Boise's branches; salesmen call on each branch and each branch orders its own needs direct from the manufacturers (F.'s 463–64).

Orders from Boise and the dealers are treated identically; separate accounts are maintained for each Boise branch (F. 465); products are shipped to the branch which ordered them (F. 463); and the method of delivery is not selected because of any differences between Boise and dealers (F. 468). Thus, although Boise does have a central headquarters, it does not offer the manufacturers any opportunities to save costs because the manufacturers must deal with its branches, just as they do with dealers competing with those branches.

Regarding quantities purchased by Boise and the selected dealers, it is probably true that overall, Boise buys more from each of the six manufacturers than does any one dealer. However, because the manufacturers service Boise's twenty-seven branches [121] individually, only the purchases by each branch as compared with the purchases by dealers, and not Boise's total purchases, are relevant to the issue of cost savings which might arise because of different quantities sold to Boise and the dealers. This comparison reveals that the Boise's distribution centers and the selected dealers' purchase volumes are often similar (F.'s 469–83).

Although volume discounts are not involved in this case, the six manufacturers treat Boise as the buying groups were treated by their suppliers in the automotive parts industry. For example, in *Standard Motor Products, Inc.*, the court found that while buying groups of distributors were favored over nonmembers, they:

> [O]rder and receive shipments direct from Standard exactly as if they did not belong to a buying group; but payments, made through the group office, are for list price, less a percentage discount equivalent to the rebate allowed under petitioner's uniform contracts for annual purchases equal to the aggregate purchases of the group. 265 F.2d at 675.

Despite the fact that the discounts in *Standard* were based on volume, and might have been adopted because the suppliers believed the different discounts reflected cost savings, the court realized that when one class of customers is served in the same way as another class, costs are identical, and aggregating the sales of one class to qualify them for a better discount does not reflect cost savings:

> The volume discounts here—which relate to the amount of the customer's total annual purchases, and not to individual sales—do not reflect any cost savings which might

accrue to petitioner on large individual orders, but merely benefit the more powerful purchasers in the industry. *Id.* at 676.

The same situation is involved here, with one exception—the six manufacturers adopted the wholesale discount because of the functions performed by that class of customers; there is not even a hint in the record that cost savings were the motivating force behind that decision.

This evidence can lead to only one conclusion, as did similar evidence in *Standard Motor Products:* It is impossible that the discriminatory prices which Boise receives from the six manufacturers are cost-justified because there are no significant [**122**] differences in the methods by or quantities in which the products are sold or delivered to Boise and the selected dealers.

Boise suggests that complaint counsel have failed to "undertake appropriate customer classifications" (RPF, p. 239) as in *Borden Co.,* 62 F.T.C. 130, 179 (1963), where the Commission rejected a cost-justification study because the seller failed to use any customer classification in its study even though it sold to a wide variety of customer groups and costs differed as between those groups.

Boise's argument ignores the significance of the fact that there are no differences in the way the six manufacturers sell to the dealers and the distribution centers. In this case, there can be no cost savings as between Boise and the dealers, and no cost study is necessary to confirm this conclusion. On the other hand, the Commission in *Borden* rejected the cost study which averaged costs because it believed that respondent realized different savings only when dealing with one class of customers as opposed to another. Given this situation, any cost study had to take account of different customer classifications. The two situations are different; thus, *Borden* imposes no burden on complaint counsel in this case.

G. *The Lower Prices Were Not Given To Boise To Meet Competition*

In *Great Atlantic And Pacific Tea Co. v. FTC,* 440 U.S. 69 (1979), the Court held that if a seller has a meeting competition defense under Section 2(b) of the Act,[21] then "a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2(f). . . ." *Id.* at 81.

On cross-examination of the six manufacturers' representatives, Boise elicited statements that they had adopted their pricing systems to meet competition (RPF 130–41), and it now claims that the adoption of such systems to meet competition is sanctioned by court deci-

[21] . . . nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . .

sions dealing with this issue, such as *William Inglis & Sons Baking Co., supra,* and *Callaway Mills Co. v. FTC,* 362 F.2d 435 (5th Cir. 1966). In *Callaway,* the court stated:

> We have found no authority which holds that in all circumstances the allowance of [123] volume discounts according to a plan or "system" as distinguished from "individual competitive" responses is condemned per se. Clearly, this is not a "basing point" case. . . . It is only when no "reasonable and prudent person" would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. *Id.* at 442.

In an *amicus* brief filed jointly with the Justice Department in *Falls City Industries,* the Commission approved of the decisions in *Callaway* and *Inglis* and stated that "both discount and area pricing systems [are] legitimate means of meeting competition under Section 2(b)" (Amicus Brief, p. 7).

In *Falls City,* the Court reversed a court of appeals decision affirming a district court finding that Falls City, a beer manufacturer, was not meeting competition because it sold, pursuant to a pricing system, to all Kentucky wholesalers at a lower price than to all Indiana wholesalers. The Court held that the 2(b) defense can be established "by showing that a reasonable and prudent businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available." *Id.* at 1297. The fact that the price discriminations were sustained "does not in and of itself demonstrate that [the] prices were not a good faith response to competitors' prices. . . ." *Id.* at 1293.

Complaint counsel do not deny that adoption of a pricing system can be a legitimate competitive response and can justify an otherwise unlawful price discrimination, but they emphasize that *Falls City* and its predecessors still demand that:

> [T]he seller offer [*sic*] the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low price. 103 S.Ct. at 1291 (Court's emphasis).

Complaint counsel have established that the manufacturers have given functional discounts to wholesalers because they sell to dealers, that the discounts are nationwide in application and do not vary from region to region, that they are given to all Boise distribution centers and that, in most cases, they have existed unchanged for many years (F.'s 489–95). Given these facts, the only reasonable conclusion is that the manufacturers' systems were not adopted for the purpose of meeting competition, but to reward a level of trade: [124]

If the seller's lower price was given *because* of lower prices by a competitor, it is cognizable under the Section 2(b) proviso; if, on the other hand, the seller's lower price was quoted *because* of a preconceived pricing scale which is operative regardless of variations in competitor's prices, as in the "basing-point" cases, his price was not genuinely made to meet a competitor's lower price and Section 2(b) cannot apply. Put another way, Section 2(b) presupposes a lower price *responsive* to rivals' competitive prices. Rowe, at 234[22] (emphasis in original).

Boise's attempt to rebut complaint counsel's proof consisted of eliciting undetailed statements from the manufacturers to the effect that their prices were adopted to meet competition. With one exception,[23] the testimony failed to answer the most basic questions which must be satisfied before one can conclude that a pricing system has been adopted to meet competition; therefore, I find that the six manufacturers did not adopt their pricing systems in good faith to meet the equally low prices of their competitors.

H. *Boise's Knowledge That The Prices It Received Were Unlawful*

1. Introduction

Section 2(f) of the Act states that "it shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section." The manufacturers' discriminatory pricing systems discussed above are illegal and prohibited by the Act, and while there is no evidence [**125**] that Boise induced the manufacturers to adopt those systems, it has received and enjoyed the benefits of those prices for many years.[24] The only question remaining is whether Boise knew or should have known that the prices which it received were illegal.

Boise denies knowledge of illegality, arguing in essence that one can never know for a certainty that any fact is true. Thus, although Boise's files contain ample evidence that it was regularly informed by the six manufacturers of their wholesale and dealer discounts, it argues that it could not "know" as a matter of absolute certainty that the manufacturers charged dealers their list price less the dealer discount. This is not, however, the kind of knowledge to which Section 2(f) refers. Complaint counsel need not prove actual knowledge of illegality:

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[22] This passage was quoted approvingly by the Court in *Falls City*.

[23] An important consideration in B&P's 1975 adoption of the WQPL prices for wholesalers was Wilson Jones, a competitor, but Wilson Jones classified only three Boise distribution centers as wholesalers prior to 1979; B&P, nevertheless, sold at the same discount to all Boise distribution centers (F.'s 494–95). Thus, even here, it is apparent that B&P's pricing system overreacted to Wilson Jones' threat and was not adopted in good faith.

[24] *American Motor Specialties Co. v. FTC*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960):

> Thus, irrespective of whether the buying groups' efforts . . . constituted an improper *inducement* under Section 2(f), we hold that the Commission introduced sufficient evidence to fulfill the requirements of *Automatic Canteen* when it showed that petitioners knowingly received preferential price treatment. . . . *Id.* at 228–29 (emphasis in original).

Thus, the buyer's prima facie violation arises upon proof that the discriminatory concession in his favor was sizeable enough to create competitive injury, and that furthermore the *nature* of the discrimination placed him on notice of its probable illegality. Rowe, *supra*, at 438 (emphasis in original).

The appropriate standard in not actual, but constructive, knowledge. *Mid-South Distributors v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961):

All persons—sellers or purchasers, corporate or animate—must now know, constructively or actually, that price discriminations which injure are prohibited. It is no defense either to sellers or buyers that either was ignorant of that much of the law's requirement. *Id.* at 517. **[126]**

a. *Knowledge Of Price Discrimination*

Since Boise's sales persons called on the same accounts as did the dealers, Boise should have known and did know that it was competing with dealers; and, because its files contained price lists which disclosed wholesaler and dealer discounts from list (F. 368), Boise knew that it received the larger wholesale discount and paid less for the same products offered by the manufacturers than did its dealer-competitors; any possible doubt that this conclusion is accurate is dispelled by Mr. Twietmeyer's stipulated testimony (F. 367).

b. *Knowledge Of Injury*

Boise's knowledge of its own profit structure, general conditions in the industry, and the extent to which it was favored over competing dealers has been established in this record. Given Boise's actual and constructive knowledge of these facts, it knew, or should have known, that the price advantages which it enjoyed were "of a kind which would cause or likely cause injury to competitors." *Mid-South*, 287 F.2d at 517.

c. *Knowledge Of Lack Of Cost-Justification*

Since Boise has acquired the businesses of dealers, it is aware of the quantities in and the methods by which the manufacturers have sold to them (F. 487), and it knew that its own distribution centers often buy in lesser, equal or only slightly greater quantities than its dealer-competitors (F. 488).

Boise is also aware that the six manufacturers have quantity discounts as well as functional discounts and that the latter were not intended by the manufacturers to reflect, and in fact do not reflect, any cost savings. The discounts are, instead, designed to encourage wholesalers to distribute the manufacturers' goods to dealers, and Boise dealt with the manufacturers pursuant to this understanding:

JUDGE PARKER: So, again, I'm saying you wouldn't go to a supplier, would you, and tell them that you're entitled to whatever the wholesale discount is if you, in fact, didn't sell to dealers, regardless of how much you bought?

THE WITNESS: Correct (F. 485). [127]

All of this evidence, and the reasonable inferences which can be drawn from it[25] leads to the conclusion that Boise knew or should have known that the discounts which it received could not possibly be cost-justified, especially in view of the very great differences in price (up to 33%) which resulted from the six manufacturers' pricing structures. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953):

> Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. *Id.* at 79–80.

d. *Knowledge That Manufacturers Did Not Adopt Their Pricing Schedules To Meet Competition*

Boise is well aware that the prices it received were granted pursuant to the manufacturers' formal pricing systems for wholesalers. The prices are often contained in published price [128] lists or discount schedules and Boise has received them for the approximately twenty years it has been in the industry, and thus cannot reasonably have viewed them as good faith responses to competitors' equally low prices. Boise knows it is the recipient of these prices not because each manufacturer is responding to a competitor, but because Boise is classified as a wholesaler by certain manufacturers and receives the manufacturers' normal discounts for customers classified as wholesalers (F. 485). No purchaser armed with knowledge of these facts could reasonably believe that the manufacturers had adopted their prices to meet competitors' equally low prices.

[25] The court in *Mid-South* at 517–18 recognized that proof a buyer had "reason to know" that a seller could not establish the cost-justification or meeting-competition defenses "may have to be established from indirect circumstantial inferences."

e. *Boise's Knowledge Of The Doubleday Defense*

Boise's knowledge of the *Doubleday* defense is not an issue in this case for *Mueller* rejected that defense and the law, as it now stands, ignores Boise's performance of wholesale functions as a justification for the receipt of illegal price discriminations. If the Commission overrules me and adopts the *Doubleday* rationale, Boise will have been given a defense which it could not have expected when it engaged in the practices which are the subject of the present complaint.

IV. Summary

1. The Federal Trade Commission has jurisdiction over this matter. In the course and conduct of its business, Boise has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act. In the course of that commerce, Boise has been and is now purchasing office product supplies for resale within the United States from manufacturers also engaged in commerce, as "commerce" is defined in the Clayton Act.

2. In connection with such transactions, Boise is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and the resale of office product supplies of like grade and quality which are purchased from the same manufacturers.

3. These manufacturers are located in the various states of the United States, and they and Boise cause the products when purchased by Boise to be transported from their place of manufacture or purchase to Boise's distribution centers located in the same state and various other states of the United States.

4. In the course and conduct of its purchase of office products in commerce, Boise has knowingly received favorable discriminatory prices or discounts from some manufacturers. [129]

5. For example, Boise resells office products at both the wholesale and retail levels but receives a wholesale discount on all office products it purchases from certain manufacturers. These wholesale discounts, however, are not available to all of Boise's competitors who sell these products to end-users.

6. The favorable discriminatory prices or discounts were not granted by the manufacturers to all of Boise's competitors nor received by all of its competitors in connection with the purchase for resale of office products of like grade and quality.

7. When Boise received the discriminatory net prices from the manufacturers, it knew or should have known that such discriminato-

ry net prices constituted discriminations in price prohibited by Section 2(a) of the Clayton Act, as amended.

8. The effect of the knowing receipt by Boise of the discriminations in price has been, or may be, substantially to lessen, injure, destroy, or prevent competition between Boise and competitors who are paying higher prices than Boise for the same office products.

9. Boise's acts and practices are violations of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended.

V. The Order

An order is justified which will prevent Boise from receiving prices computed on the basis of its function as a wholesaler when it, in fact, competes with another level of trade which is not receiving a like discount. The same principle was upheld in *FTC v. Ruberoid Co.,* 343 U.S. 470 (1952) in which the Court affirmed a Commission order requiring Ruberoid to:

> [C]ease and desist from discriminating in price:
>
> By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products. *Id.* at 472.

Boise can lawfully receive a wholesale functional discount on goods which it resells as a wholesaler—*i.e.,* to dealers, [130] but if it chooses to remain a dual distributor by also reselling in competition with dealers, it will have to offer the Commission a compliance plan under which it will inform its suppliers as to the dollar volume of goods it purchases as a wholesaler and as a dealer. *Compare Abbott Laboratories v. Portland Retail Druggists Association, Inc.,* 425 U.S. 1, 20 (1976).

Therefore, the record having established that Boise has been, and is now violating Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act, entry of the following order is appropriate:

Order

I.

A. *Boise Cascade* shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. *Office Products* shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division.

C. *Net Price* shall take into account all discounts, rebates, allowances, deductions or other terms and conditions of sale.

II.

It is ordered, That Boise Cascade, in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products.

III.

It is further ordered, That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of office products. **[131]**

IV.

It is further ordered, That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order.

V.

It is further ordered, That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as may, from time to time, be required to assure compliance with the terms and conditions of this order.

Opinion of the Commission

By Calvani, *Acting Chairman:*

I. INTRODUCTION

On April 23, 1980, the Commission issued a complaint charging that Boise Cascade Corporation ("Boise") had violated Section 2(f) of the Robinson-Patman Act (the "Act"), 15 U.S.C. 13(f), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[1] After extensive discovery, hearings began on April 13, 1982, and the record was closed on August 17, 1983. Judge Lewis F. Parker, before whom the matter was tried, rendered his Initial Decision on February 14, 1984, finding Boise in violation of the Act. Boise has appealed from that decision.

Boise sells office products both as a wholesaler and as a retailer. Its combined wholesale and retail operations make it the country's largest distributor of office products, and Boise's resales to other dealers make it one of the two largest [2] wholesalers. I.D.F. 52–53.[2] Out of its total corporate sales of $3 billion in 1980, largely in forest products, over $850 million was attributable to its packaging and office products businesses. I.D.F. 1. The complaint alleged that Boise had received from certain suppliers a wholesaler's discount on products that Boise resold at retail, in competition with dealers to whom this wholesaler's discount was not available.

Thus, this case deals with claims about functional discounts. A functional discount occurs when a seller permits one buyer, *e.g.*, a wholesaler, to purchase a product at a lower price than another buyer, *e.g.*, a retailer, because of the marketing functions that the favored buyer performs for the seller's product. If the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the [3] prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act. But the differing discounts may have legal consequences where the "wholesaler," or the favored buyer, sells not as a middleman reselling

[1] Although the complaint alleges violations of both the Robinson-Patman and Federal Trade Commission Acts, the latter count, in this case, is completely derivative, *i.e.*, Section 5 of the Federal Trade Commission Act would have been violated only because of a violation of the Robinson-Patman Act. Accordingly, there is but one question: Has Section 2(f) of the Robinson-Patman Act been violated?

[2] The following abbreviations are used in this opinion:

I.D. – Initial Decision, February 14, 1984 (cited by page number of slip opinion).
I.D.F. – Initial Decision, February 14, 1984 (cited by finding number).
R.A.B. – Respondent's Appeal Brief, April 4, 1984.
C.A.B. – Complaint Counsel's Answering Brief, May 11, 1984.
R.R.B. – Respondent's Reply Brief, June 1, 1984.
Tr. – Hearing Transcript
C.P.F. – Complaint Counsel's Proposed Findings, September 16, 1983.
C.L.A. – Complaint Counsel's Legal Argument, September 16, 1983.
R.L.A. – Respondent's Legal Argument and Proposed Findings of Fact and Conclusions of Law, December 20, 1983.

to retailers, but acts itself as a retailer in selling to end-user customers, in competition with other retailers that could not obtain wholesaler discounts. Here, Boise is both a wholesaler and a retailer, but receives a wholesaler discount on all the goods it buys. In evaluating the effects on competition, does the Act require that an integrated entity's distribution level be determined by its buying function or by its selling function? Put differently, if a retail chain has its own wholesale unit, does the Act require—or permit—a supplier to give the chain a wholesaler discount or a retailer discount?

The Commission ordered that the Administrative Law Judge's findings be sufficient for disposition of the complaint under two apparently different legal theories, that is, under both *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964), and the case that *Mueller* had overruled, *Doubleday and Co.*, 52 F.T.C. 169 (1955). In *Doubleday*, the Commission had stated that a seller could offer a functional discount to a reselling buyer who performs "wholesale functions" if the amount of the discount was reasonably related to the expenses assumed by the buyer and did not exceed the cost of that part of the function that the buyer actually performed. 52 F.T.C. at 209. Under *Doubleday*, a purchaser's buying function and its reselling function could both be considered in judging [4] the legality of a functional discount, and the case appeared to sanction, or at least facilitate, granting wholesaler discounts to dual distributors even for goods resold in competition with retailers who did not receive the wholesaler discount. However, since 1962, when the Commission decided *Mueller*, *supra*, the competitive significance of a functional discount under the Act has been determined only by the capacity in which the purchaser resells. The Commission there rejected the argument that an additional discount to certain distributors was merely compensation for inventory services. It held that the additional discount, even if it was reasonably related to the cost of services provided, could still result in secondary line competitive injury, and that to allow the discount based on the customer's costs would create a defense not found in the Act.

Following the Commission's instruction, the Administrative Law Judge admitted evidence about the services and functions performed by Boise, in order to permit the case to be decided under both *Mueller* and *Doubleday* theories. Judge Parker found liability under the *Mueller* rule, which he concluded was the appropriate rule of law, but also found liability under *Doubleday* if that were the appropriate rule. I.D. 118–19. Boise has appealed the Initial Decision on numerous grounds, but primarily on whether *Mueller* or *Doubleday* states the appropriate rule to be applied, and whether other factors establish or rebut a finding of competitive injury. Thus, today the Commission

again confronts the *Mueller/Doubleday* issue. We adopt the Administrative Law Judge's findings and conclusions, and thus [5] affirm that Boise knowingly received unlawful discounts in violation of Section 2(f) of the Act.

II. KNOWING RECEIPT OF PRICE DISCRIMINATION

Other than the determination of injury under the Act and the establishment of the Act's affirmative defenses, the basic elements of liability under Section 2(f) are not seriously in dispute. Boise does not challenge the ALJ's findings on the various jurisdictional interstate commerce requirements. Boise does not deny that it received wholesaler discounts on office products, both on merchandise that it resold to other dealers and on merchandise that it sold to end-user customers in competition with them. These dealers received smaller discounts from the manufacturers. Illustrating the effect of the discrimination, the trial record includes proof of typical transactions showing that some 23 retailers that compete with Boise regularly purchased goods made by six manufacturers at prices higher than those that Boise paid. Presenting detailed evidence about only six suppliers and a limited number of retailers was consistent with evidentiary standards applicable in complex Robinson-Patman litigation, and was also clearly dictated by considerations of litigation economy. Proof through such sampling techniques is preferred, and perhaps even mandatory, to avoid undue burden. *See United States v. Borden,* 370 U.S. 460, 466 n.6 (1962); *Automatic Canteen Co. v. FTC,* 346 U.S. 61, 65 n.3 (1953). Wholesaler "functional" discounts are prevalent throughout the industry, and most manufacturers, not just the six chosen for focus in the trial, treat Boise as a wholesaler. I.D.F. 11–14. [6] The record thus establishes that Boise has received the benefit of discriminatory prices.

Moreover, the record clearly discloses that Boise was aware that it was receiving discriminatory preferences. A common difficulty in buyer liability cases under Section 2(f) of the Act is proving that the buyer knowingly received favored treatment. *See Automatic Canteen Co. v. FTC,* 346 U.S. 61 (1953). The Act does not impose liability on an "unsuspecting recipient" of an unlawful price, but a buyer's experience in the marketplace should be taken into account in determining what a knowledgeable buyer "should have known." *Id.* at 80–81. Here, however, Boise unquestionably had actual knowledge that it could purchase products at cheaper prices because it had been classified as a wholesaler rather than a retailer, and that the greater discounts gave it an advantage over disfavored dealers. Gerald Twietmeyer, a former Boise manager, testified:

As an employee of Boise Cascade in 1978, I supervised and participated in a study which showed that Boise received a substantial dollar amount of trade or wholesaler functional discounts from various office products vendors *and those discounts exceeded the discounts Boise would receive if those vendors did not classify Boise as a wholesaler but instead treated Boise as a dealer* or contract stationer.

I.D.F. 14 (emphasis added). George Harig, a Boise headquarters employee, told a Boston dealer that Boise's access to wholesaler discounts that would not have been available to it as a dealer would result in lower costs of goods sold and thus greater profit. I.D.F. 39. Boise received complaints from several dealers and from the National Office Products Association, the [7] primary industry trade association, that dealers could not purchase from manufacturers at prices as low as Boise's and that Boise was selling to their end-user customers at prices that dealers could not compete with. I.D.F. 36. In addition, some suppliers furnished wholesalers, including Boise, copies of price schedules that quoted their prices to retail dealers. I.D.F. 151, 195, 241, 363. The evidence thus shows directly that Boise was informed, and fully aware, of its price advantage. As Judge Parker observed, "Even if this conclusive evidence had not existed, it is inconceivable that Boise, which resells to dealers, would be unaware of the prices which manufacturers charge dealers, for other wholesalers who testified expressed keen interest in awareness of dealer prices [citation omitted], as did Boise employees." I.D.F. 368.

III. SECONDARY LINE INJURY UNDER THE ACT

Boise's ability to purchase products at prices lower than those available to its retail competitors could enable it to undersell those competitors. The chief issue in this appeal is whether Boise's price advantage supports a finding of competitive injury as defined by Section 2(a) of the Act and the cases under that section. [8]

A. *The Injury Standards of Section 2(a)*

Boise claims that evaluating a Robinson-Patman claim of injury requires a competitive analysis like that used to analyze a merger under Section 7 of the Clayton Act, 15 U.S.C. 18.[3] However, Section 2(a) of the Act includes two somewhat different tests for assessing injury, one that parallels the test found in Section 7 and elsewhere in the Clayton Act, and another that permits a finding of illegal injury

[3] Respondent claimed, in the proceedings before the ALJ, that proof of injury under the Act requires a competitive analysis that includes the definition of the geographic markets, the definition of the product markets, examination of the size and market shares of each competitor, and determination of the point at which a price difference causes buyers to shift suppliers. Tr. 1820–25; R.A.B. 18. Boise asserted that the injury analysis under § 2 of the Clayton Act is the same as the injury analysis under § 7 of the Clayton Act and § 2 of the Sherman Act, and that actual injury must be shown to establish a § 2(a) violation. R.L.A. 214.

based upon effects on competitive relationships in the face of price discrimination.

Like the other sections of the Clayton Act, Section 2(a) is violated when the effect of the challenged practice "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." When it amended Section 2 of the Clayton Act in 1936, Congress added a second and separate injury formulation. Thus, as amended, the Section also proscribes discrimination that may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit" of price discrimination, or with their customers. These tests are stated as alternatives, and the history of the Act makes clear that Congress in 1936 was principally concerned about [9] possible effects on particular competitive relationships that were not adequately redressed by the Clayton Act's original injury formulation. Where the competitive effect described by this second test has been demonstrated under long-established interpretations of the Act, we cannot simply ignore it on the grounds that efficiency arguments might justify refusing to find liability under the first test. It is for Congress, not the Commission, to delete the second test from the Act if it so chooses. *Cf. Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983).

Characterizing the treatment of competitive injury can depend on the marketing level at which the discrimination occurs. Seller or "primary" level cases, involving competing sellers' impact on each other, often involve allegations of predatory or below-cost pricing, and the analysis often focuses on a firm's use of market power. Thus, such cases can closely resemble complaints of actual or attempted monopolization under Section 2 of the Sherman Act, and recent primary line cases have stressed the close relationship between the standards for Section 2 of the Sherman Act and Section 2(a) of the Clayton Act. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *but see Zoslaw v. MCA Distributing Corp.*, 594 F.Supp. 1022, 1034 n.7 (N.D. Cal. 1984). Purchaser or "secondary" level cases focus on the effects of pricing on competition in the [10] middle of a distributional chain.[4] These cases typically involve numerous competing purchasing firms in markets with low price differences and low profit margins, where discrimination in favor of some firms permits them an unfair advantage in competition with others for resales. Determining secondary line injury does not depend on the effects of a pricing practice on competition at the primary level, just as determining a primary

[4] Buyer or purchaser level injury is termed "secondary" injury when it occurs in connection with the resale of products after purchase from the discriminating seller. In a distribution system with several levels of resale, there can be several levels of potential purchaser injury, to tertiary levels and beyond. For simplicity, all of these levels will be termed "secondary."

line case need not depend on the effects of a seller's different prices on secondary line competition. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). Analysis of competitive effects in primary line situations typically involves a focus on effects in the overall market, similar to the analysis used in Sherman Act cases. Secondary line analysis, based on the second injury test added by the 1936 Robinson-Patman amendments, typically assesses the effects of a practice on competitive relationships among firms at the reseller level. Both standards involve assessments of competition, but from different perspectives. In secondary line situations, the concern of the law, especially in light of the 1936 amendments, is on competition as fairness.

To claim that the second statutory test can be ignored, or that it must be interpreted as subsumed in the first, and thus that it added nothing to the original Clayton Act, is to read the [11] Robinson-Patman Act out of the law. That view is not the law and never has been. Even Judge Richard Posner, noted for his emphasis on economic analysis as a guide to antitrust policy, has characterized Boise's approach as a "polar extreme" view. R. Posner, *The Robinson-Patman Act* 38–40 (1976). None of the cases Boise cites in its brief mandates, or even employs, the analysis Boise advocates. In *Fred Bronner Corp.*, 57 F.T.C. 771 (1960), the Commission recognized that, in determining competitive effect under the Act, the magnitude of the discrimination "must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal." *Id.* at 782. But the Commission did not hold that a market power analysis is the only way to examine "the actual competitive situation." Instead, the Commission examined the claims about the size of the preferential discount (both absolute, and as a percentage) and competitors' claims about their profitability, but was unpersuaded that there was injury. There is no suggestion that the record's lack of a market power analysis was fatal, or even significant. In *Sun Oil Co.*, 55 F.T.C. 955 (1959), *rev'd on other grounds*, 294 F.2d 465 (5th Cir. 1961), *rev'd on other grounds*, 371 U.S. 505 (1963), the Commission considered evidence of competitive effect that included price differences, direct evidence of lost sales, and similarity of costs, operations, and geographic location that tended to support the inference of injury. 55 F.T.C. at 974–76. This evidence was not considered as a substitute for an inference based on the conditions of the discrimination, but as a [12] supplement to it. Again, there was no full market power analysis and no hint that such analysis is necessary. The other cases Boise has cited similarly fail to demonstrate a need for market power analysis. *United Biscuit Co. v. FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Quaker Oats Co.*, 66 F.T.C. 1131 (1964).

The interpretation and application of the Act should be consistent

with the interpretation and application of the other antitrust laws whenever possible. The Supreme Court has directed that interpretations of the Act requiring or condoning clearly anticompetitive results are to be avoided. Thus, Robinson-Patman compliance goals do not justify price-fixing, *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978), or abandoning vigorous price bargaining, *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 80–81 (1979). The Supreme Court has rejected constructions and applications of the Act that are contrary to its plain meaning, that extend beyond its prohibitions, and that lead to anticompetitive results "in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Co., supra.* The Commission has recently declined to use Section 5 to extend the Act's reach, where the effect would be in conflict with the competition goals of the other antitrust laws. *General Motors*, 103 F.T.C. 641, 700–01 (1984). **[13]**

But in counseling consistency and the avoidance of clearly anticompetitive results, the Court has never required that the purpose of the Robinson-Patman Act be disregarded. The Court has recognized the Act's legislative purpose to be "to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

B. *The Morton Salt Standard for Inferring Secondary Line Injury*

We turn now from the definition of competitive injury to its measurement. The Act's purpose to assure a "level playing field" for businesses at the same functional level has been incorporated in a long line of precedents establishing rules for inferring injury in secondary line situations like the one presented here. Rather than engage the full apparatus of a rule-of-reason analysis, the cases have evaluated the likely effects of price discrimination on competitive conditions by the use of reasonable and rebuttable inferences, supported by experience and legal precedent.

In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court has very recently reaffirmed the use of this inferential approach, as announced in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).[5] The *Falls City* Court held that Section 2(a) does not require proof of actual harm to competition, **[14]** because the Act is aimed at discriminations that "may" have the proscribed anticompetitive effects. Justice Blackmun, writing for the Court, observed:

[5] In an amicus brief in *Falls City*, the Commission expressly endorsed the *Morton Salt* test as *prima facie* evidence of competitive injury. Brief for the United States as Amicus Curiae in Support of Reversal at 9 n.7 (May 1982).

In *Morton Salt* this Court held that, for the purposes of §2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the casual connection between a price differential and lost sales or profits.

460 U.S. at 435 (citations omitted). If Complaint Counsel had presented direct evidence to establish displaced sales, liability might have been shown directly and conclusively, absent the presence of affirmative defenses. But Complaint Counsel here has relied upon inference to show injury, and thus Boise has an opportunity to rebut the *prima facie* case by "breaking the causal connection" between its favored price treatment and lost sales or profits of its competitors.

Boise urges that Complaint Counsel has failed to establish the fundamental *Morton Salt* factor, substantial differences in price persisting over time. Complaint Counsel's proof of this factor is a series of charts showing differences between discounts granted to Boise and those granted to its retail competitors. These charts summarize data from thousands of individual invoices. Boise claims that because the sample invoices were not selected at random and because non-discriminatory transactions were intentionally excluded, the charts are unreliable. We reject this argument. The invoices could not have been randomly drawn, but instead had to be [**15**] selected by supplier and product, to satisfy the Act's requirement of like grade and quality. 15 U.S.C. 13(a). Boise also complains that Complaint Counsel excluded a few invoices that show Boise not getting a better deal. The evidence includes fewer than a dozen instances of dealers receiving as good a discount as Boise, but evidence based on some 5800 instances showing Boise getting the better discount, with the advantage ranging from 5 to 33 percent. This is reliable evidence of substantial price differences.

Boise also attacks the use of invoice price as an appropriate way to measure the cost of goods sold, because "there is no way of knowing whether an invoice was paid and in what amount." R.A.B. 20. The Commission has considered and rejected this argument before. In *Fred Meyer, Inc.*, 63 F.T.C. 1, 48 (1963), *modified*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part*, 390 U.S. 341 (1968), the Commission stated: "Respondents' argument that the prices appearing on invoices are not 'evidence' of the price actually paid is rejected . . . these documents are records kept in the ordinary course of business and are thus *prima facie* evidence of the business facts they purport to show." *See also Guyott Co. v. Texaco, Inc.*, 261 F.Supp. 942 (D. Conn. 1966); 16C J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 27.03[3][a] (1985).

Boise next urges that even if a difference in price for the six manufacturers has been shown, its magnitude is competitively [**16**] insignificant. The thrust of Boise's argument is that the total dollar

amount of discrimination is inconsequential, the six discriminating suppliers are unimportant to the dealers, and any discrimination is trivial in light of the full range of office products sold to commercial accounts. On the contrary, the facts are that the price discriminations in this case are among the largest found in any case.[6] The differences in prices paid by Boise and the dealers here ranged from 5 to 33 percent. The amount of commerce affected was hardly trivial; Boise's purchases from the six manufacturers in 1979 exceeded $10 million. Boise's effort to isolate particular products at individual dealers to compute allegedly trivial gross discriminations ignores the obviously substantial impact of the pattern of such large discriminations in the market as a whole. Boise apparently believes that the Commission cannot prove secondary line injury except by painstaking summation of thousands of affected commercial transactions, so that the Commission's failure to make that calculation means that its method is unsound. On the contrary, sampling techniques are expressly sanctioned by the courts in cases like this one. Moreover, Boise is wrong when it suggests that the survey of 5800 invoices shows only trivial differences. Boise cites examples of total sales from one [17] manufacturer to two different dealers of a few hundred dollars or less, R.A.B. 24, but fails to note that in another situation the same manufacturer made sales to another dealer and Boise where the price *differences* on the disfavored dealer's purchases amounted to over $20,000, CX 2A. There are numerous transactions recorded in these exhibits where individual price differences amounted to thousands of dollars.

As to the law, the Supreme Court recently reaffirmed its decision in *Morton Salt,* which rejected an argument like the one Boise is now making. Salt is a very insignificant single good when compared with the full range of grocery products sold, but the Supreme Court explicitly rejected the contention that no injury could result from the discriminatory pricing of salt because "salt is a small item in most wholesale and retail businesses and in consumers' budgets." 334 U.S. at 49. The Court pointed out that "there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store." *Id. Accord, Gold Strike Stamp Co. v. Christensen,* 436 F.2d 791, 797 (10th Cir. 1970); *United Biscuit Co. v. FTC,* 350 F.2d 615, 622 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966). This is equally true in the office products industry where dealers and respondent stock thousands of individual products from hundreds of suppliers. Complaint Counsel has demonstrated illegal discriminations involving multiple products

[6] *See Kroger Co. v. FTC,* 438 F.2d 1372, 1379 n.4 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971), where the court gave six specific examples of substantial illegal discounts in secondary line cases. None of these examples exceeded 12% except in *Fred Meyer, Inc. v. FTC,* 359 F.2d 351 (9th Cir. 1966), where the discount was 33% but was given only once per year.

from six of these suppliers, and the record establishes that similar functional discounts are "prevalent" in the industry. In [18] these circumstances, Complaint Counsel is not obligated to test the legality of pricing practices for each of the thousands of individual articles. Such a "plethora of cumulative evidence" is an unnecessary burden on the record, *see Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 n.3 (1953).

Boise next urges that there has been no causal connection established between the price differences and competitive injury. Once again, we look to *Morton Salt*. That decision, as reaffirmed by the Supreme Court in *Falls City*, makes clear that the connection is established by the inference, and thus it is Boise that is required to rebut the inference by "evidence breaking the causal connection between a price differential and lost sales or profits." 460 U.S. at 435. Thus, in particular industry circumstances, evidence that other market conditions explained the effects on the disfavored competitor could break the normally expected, logical connection. *See Falls City, supra*, 460 U.S. at 437; Rowe, *Price Discrimination Under the Robinson-Patman Act* 186–95 (1962). The inferred causal link between price discrimination and injury can be broken by evidence demonstrating and documenting specific market causes that explain lost accounts or shifted sales. *See, e.g., Dean Milk Co. v. FTC*, 395 F.2d 696, 703–08 (7th Cir. 1968). But Boise does not adduce any such evidence; indeed, Boise does not address the causal connection at all. Instead, it cites evidence that tends to show that competition in the industry has not disappeared. [19]

This argument fails to rebut the "self-evident" inference of causation, as contemplated by *Falls City*. Instead, this is an attempt to prove the absence of actual injury. The Act, however, is addressed to the threat of injury, as well as to its accomplished fact. Boise's insistence that "*actual injury must be shown* to satisfy the competitive injury requirement of the statute," R.L.A. 214, is wrong. Rather, the competitive injury requirement of Section 2(a) is satisfied by a showing of "a reasonable possibility that a price difference may harm competition." *Falls City, supra*, 460 U.S. at 434–35. In keeping with the Act's prophylactic purpose, Section 2(a), and hence Section 2(f), do not require that the discriminations must in fact already have harmed competition. *Id.* at 435, *citing J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). These recent cases restate and reaffirm principles laid down in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945).[7] The Administrative Law Judge correctly

[7] The injury to competition element of a government enforcement action is different from the fact of injury or damages elements of a private treble damage action. Even in a private action, actual injury need not be shown to make out a violation of Section 2(a); however, Section 4 of the Clayton Act requires a showing of actual injury caused by defendant's violation of the Act as a predicate for the award of damages. *J. Truett Payne, supra*, 451

(footnote cont'd)

concluded that respondent's approach "has not been adopted in the case law, and it ignores the language of the Act." I.D. 113. [20]

IV. TREATMENT OF FUNCTIONAL DISCOUNTS

Boise's major argument against liability is the claim that the prices it pays include a discount that represents the value of distributional functions it performs. The discounts in question are the ones Boise receives as a wholesaler. There is no dispute that Boise performs wholesaler functions in its middleman capacity, such as warehousing inventory, handling credit and bookkeeping, publishing product catalogs, and providing sales assistance to dealers in promotional activities. Discounts to compensate Boise for its performance of these functions as a wholesaler are not at issue here.

However, about half of Boise's sales are at retail, not at wholesale. In purchasing these goods that it resells at retail, Boise still gets the wholesaler discount. Those retail sales are made in competition with dealers who generally cannot get the wholesaler discount because they do not make wholesale sales. I.D.F. 375, 446–54, 522. Yet the record shows that the dealers, many of which are substantial operations, also perform distributional functions similar to Boise. They thus incur distributional costs, but cannot obtain the discounts Boise receives to compensate for them, and thus cannot price competitively with Boise at retail.

This disparate treatment is the gravamen of the complaint. The fundamental question presented is whether the "functional" discounts Boise receives on the goods it resells at retail are [21] illegal because they cause injury to competing retailers who are denied these discounts.

The Act does not expressly address functional discounts, and the legislative history is inconclusive. Early drafts of what became the Robinson-Patman Act had dealt explicitly with functional discounts, and the Senate Report suggested that a specific exemption was needed to maintain their legality. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936). The special exemption was dropped from the final text. In light of the Senate Report, this deletion might thus be viewed as legislative disapproval of functional discounts. On the other hand, functional discounts were a common business practice when the Act was passed, and it might be presumed that Congress would not have acted merely by omission if it truly wanted to forbid such a common practice.

U.S. at 561–62; *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 19 (1st Cir. 1981); Calvani, "The Mushrooming *Brunswick* Defense: Injury To Competition, Not To Plaintiff," 50 *Antitrust L. J.* 319, 326–28 (1981); E. Kintner, *A Robinson-Patman Primer* 299 (1970).

In the absence of an explicit instruction from the legislature on this issue, the general terms of the Act's text, understood in the context of the Act's purposes, must be applied. The major legislative purpose behind the Robinson-Patman Act was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores, *see General Motors Corp.*, 103 F.T.C. 641, 693–96 (1984). Accomplishing this purpose can be inconsistent with the goals of the other antitrust laws, so the Commission will eschew efforts to broaden the Act's application beyond that established by law, *id.* at 696, where such [**22**] inconsistencies would result. But the Commission may not refuse to apply the Act to accomplish Congress' purposes where the law is well established.

Both the *Mueller* rule and the *Doubleday* rule are glosses on the competitive injury tests of Section 2(a). As such, neither is clearly required or clearly forbidden by the Act's text. Properly applied, we believe that the *Mueller* rule is consistent with the Act's purposes, and we are not persuaded that it should be overturned.

A. *The Mueller Rule*

Mueller holds that a favored distributor cannot avoid the inference of competitive injury by claiming that its costs equal its discriminatory advantage. The Commission in *Mueller* rejected the contention that functional discounts to a distributor no greater than the distributor's cost of providing middleman services could never cause competitive injury to other distributors not receiving the same discount. The Commission also rejected the alternative formulation, construing the argument as a claim for a defense, that such discounts ought to be legal in spite of possible competitive injury. Instead, the Commission explained that a favored distributor could have a competitive advantage over its competitors even if the price impact of its favored purchasing position were consumed by its cost of handling the items sold in competition with them. In *Mueller*, the stocking jobbers, who received a 25 percent discount, could provide more rapid service than their nonstocking competitors, who received a 15 percent discount, in an [**23**] industry where service was a critical competitive factor. Even if the extra 10 percent discount did no more than cover the stocking jobbers' inventorying costs, the Commission concluded that the stocking jobbers were still in a better competitive position than their nonstocking competitors.

The Commission also suspected that the cost-reimbursement rationalization was not the discount's principal justification. Although the extra discount was allegedly justified as compensation for providing inventory services, the favored stocking jobbers received the

greater discount even on products that were ordered only in response to customer orders, and thus were never warehoused or inventoried. There could be no justification for granting a special discount to compensate for services that were never rendered. 60 F.T.C. at 128. Moreover, the greater discounts were denied to many non-stocking jobbers who could qualify by performing the inventory service. Instead, the Commission concluded that Mueller was using the greater discount to protect and reward certain favored distributors. 60 F.T.C. at 129–30. Such unjustified favoritism is precisely what the Robinson-Patman Act is intended to prevent.

Thus, the case reinforces the standard inference in secondary line cases that substantial, persistent price differences may have the effect of injuring, destroying, or preventing competition. *Mueller* tends to reinforce clear roles and distinctions between different levels of trade, and thus arguably to preserve independent wholesaling and retailing entities, as Congress intended. Under *Mueller,* the likelihood is [**24**] increased that businesses "at the same functional level would start on equal competitive footing so far as price is concerned." *FTC v. Sun Oil Co.,* 371 U.S. 505, 520 (1963).

One criticism of the *Mueller* rule is that it has been used against cooperative purchasing ventures of small business entities that have banded together to compete more effectively with large integrated concerns. Application of *Mueller* to bar purchasing ventures by small independents would seem to work a perverse result given the Act's protectionist purpose.[8] Mechanical application of *Mueller,* such as against some kinds of group purchasing entities, could be inappropriate. *But see National Parts Warehouse,* 63 F.T.C. 1692, 1730 (1963), *aff'd sub nom. General Auto Supplies, Inc. v. FTC,* 346 F.2d 311 (7th Cir.), *cert. dismissed,* 382 U.S. 923 (1965). However, Boise is not such a group purchasing entity, and there is no need to resolve this dilemma in order to decide this case.

Mueller does not foreclose the theoretical possibility that an inference of competitive injury could be rebutted in a dual distribution situation. The Commission there rejected a claim that discounts no greater than the costs incurred must be *per se* legal; it did not hold that across-the-board discounts to dual distributors are *per se* illegal. As a practical matter, it may be difficult in most common commercial settings for a favored [**25**] dual distributor to rebut the inference of injury. As a legal matter the inference is nonetheless rebuttable.

Under *Mueller,* if the costs of sale or delivery being compensated by the discount are truly the supplier's own costs, then those cost savings could support a cost justification defense. Thus, Boise's reliance on

[8] *See* Calvâni, "Functional Discounts Under the Robinson-Patman Act," 17 *B.C. Ind. & Com. L. Rev.* 543, 555, 567–75 (1976), for a discussion of this problem and a collection of group purchasing cases.

showing its *own* costs of performing services to avoid the inference of injury is not probative. Boise sells to end-user customers in competition with other dealers, yet purchases at lower prices than are available to those dealers. Its claim that the price difference is no greater than its costs of performing services and therefore that there can be no competitive injury due to its discriminatory advantage is rejected by *Mueller,* and by this Commission.

B. *The Doubleday Doctrine*

The *Doubleday* doctrine, as originally formulated, would hold almost as a matter of law that discriminatory discounts no greater than the costs borne in providing services could not cause competitive injury under the Act. The justifications offered for the doctrine are distributional efficiency and [**26**] promotion and toleration of diverse distribution methods.[9] *Doubleday* would permit a discount justified not by the supplier's cost savings but by its customer's. The cost justification defense in Section 2(a) refers to the differences in costs of the discriminating seller, not to the differences in costs of favored and disfavored buyers. Thus, if the *Doubleday* rule is construed as a defense to a statutory violation, there is no textual support for it.

The rule can be difficult both to understand and to apply. The costs of the manufacturer's customers in performing certain functions will surely vary, depending on differences in customer operations, efficiency, location, and product mix. C.P.F. 815. Hence the discounts allowable under *Doubleday* could vary from customer to customer. A manufacturer almost certainly could not know in detail each customer's costs to perform certain functions.[10] Granting the different discounts based on guesses [**27**] about individual customer costs could easily lead to discriminatory prices. Even if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives.

Even if we were to reject *Mueller* in favor of the *Doubleday* doctrine, we would still affirm the Initial Decision. Under *Doubleday,* the amount of the discount must be reasonably related to the expenses assumed by the buyer and should not exceed the cost of that part of

[9] It is, perhaps, misleading to refer to *Doubleday* as a "doctrine." Chairman Howrey, who authored the principal opinion, was joined on this issue only by Commissioner Mason. Commissioner Gwynne concurred in the result, but did not join an opinion. Two other Commissioners each wrote opinions concurring in the result but explicitly disagreeing with Chairman Howrey about the functional discount rule. More importantly, the *Doubleday* rule was short lived. Less than six months later, Commissioner Gwynne, having assumed the Chairmanship, authored the Commission's unanimous decision in *General Foods Corp.*, 52 F.T.C. 798 (1956), which rejected arguments similar to those involved in *Doubleday* albeit without mentioning that decision.

[10] Indeed, the customers might not be able to isolate and identify the relevant costs either, because of problems of analyzing joint costs. J. Clark, *Studies in the Economics of Overhead Costs* (1923); L. Telser, *Economic Theory and the Core* ch. 2 (1978).

the function it actually performs. 52 F.T.C. at 209. The record does not show that Boise's discounts met that standard.

Boise claims that under *Doubleday* "an integrated wholesaler is entitled to a wholesale discount on all the goods it purchases." R.A.B. 10. That is not the holding of *Doubleday.* A more careful reading of that case limits the availability of wholesale discounts.

> Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. . . . On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

52 F.T.C. at 209. Finding that the discounts granted were not [28] reasonably related to the expenses, the Commission found Doubleday in violation.

Here, as in *Doubleday,* the evidence does not show that the cost to Boise of performing the services is equal to or greater than the discounts it receives, purportedly as compensation for them. The cost study Boise offered is methodologically questionable, as demonstrated by its prediction of results contrary to actual experience. I.D. 118. Moreover, the study does not address the *Doubleday* issue. Instead, the study focuses on Boise's costs of reselling to dealers and ignores the costs incurred on goods resold to end-users. Thus there is no way to determine from this study whether the favorable discount Boise enjoyed on its sales to end-users was equal to the costs it assumed in selling to them—the very issue under the *Doubleday* rule. Further, the evidence does not identify or isolate the costs shifted from manufacturers to Boise, nor the costs to Boise of services not performed by disfavored dealers.

There is a further reason why Boise does not meet the *Doubleday* standard. Under *Doubleday,* a manufacturer could grant functional discounts to encourage and compensate customers choosing to take on certain marketing functions. Competing customers who chose not to perform those functions would not get the discount. As Judge Parker observed:

> Doubleday's defense was that the wholesalers who received extra discounts were being compensated for services they performed and which were *not* performed by the unfavored customers, 52 F.T.C. at 199–200, and the Commission's acceptance of this argument was based on this assumption. This situation—that the favored buyer performed resale [29] functions which the unfavored did not—is absent here.

I.D. 118.

The record shows that dealers often performed the same functions as Boise. I.D. 118. Dr. Kenneth Elzinga, Boise's expert, made it clear that large dealers, which buy in large quantities from manufacturers, hold inventory, break bulk, and sell to large end-user accounts, are also vertically integrated. Elzinga Tr. 6430–33; I.D.F. 520. In other words, a firm need not be a dual distributor to be vertically integrated. (Indeed, Dr. Elzinga also testified that if respondent ceased selling to dealers and sold only to end-users, that would not necessarily mean Boise had ceased performing the wholesale function. Elzinga Tr. 6431–33; C.P.F. 823.) However, these vertically integrated dealers received no similar discounts to compensate them for performing these similar functions.

The major differences between Boise and these large, vertically integrated dealers are that Boise operates on a much larger scale and that Boise also sells to other dealers as well as to end-user customers. Putting aside the question of scale of operation, the unique "function" Boise performed was "selling to dealers." Under *Doubleday* the amount of the discount "should not exceed the cost of that part of the function he actually performs *on that part of the goods for which he performs it.*" 52 F.T.C. at 209 (emphasis added). Therefore, even if the "marketing function" were viewed as "selling to dealers," respondent should receive the greater discount only on those goods resold to dealers. But Boise received the discount on all of its **[30]** purchases. By contrast, dealers competing with Boise and performing the same distributional functions received the discount on none of their purchases.

Both *Mueller* and *Doubleday* address the conflict between the law's requirement of non-discriminatory prices and the seller's desire to compensate for shifting selling functions to distributors. Criticisms of the two doctrines stress their different "preferences." *Mueller,* favoring the legal goal of non-discriminatory prices, is alleged to prohibit compensation for valuable marketing functions, thereby penalizing efficiency. *Doubleday,* favoring the goal of distributional efficiency, is alleged to produce prices that differ widely from competitor to competitor, with discriminatory impact contradicting the Robinson-Patman amendments.

But neither *Mueller* nor *Doubleday* prohibits compensation for marketing functions performed to encourage efficiencies. There are at least three specific circumstances where a seller could offer compensation consistent with the requirements of the Act and with *Mueller* and *Doubleday.* First, functional discounts may usually be granted to customers who operate at different levels of trade, and thus do not compete with each other, without risk of secondary line com-

petitive injury under the Act. Second, even a customer that operates at more than one level of trade may still receive some functional discounts. There will ordinarily be no violation of the Act if the dual distributor receives the wholesaler discount only on the goods it resells to other dealers and receives a retailer discount on the goods it sells in [31] competition with other retailers. A customer who performs more than one reselling function can receive different discounts depending on the function. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977). Obviously, it may be necessary to keep detailed records to identify transactions at different functional levels. Finally, a customer that operates at more than one functional level might even receive a uniform discount on all of its purchases, if such a discount is practically available to this dual distributor's competitors. A supplier is free to "purchase" wholesale and inventory services for goods that actually receive the benefit of those services, as long as such payment or consideration is available on proportionally equal terms to all other customers competing in distribution. *See General Foods Corp.*, 52 F.T.C. 798, 824–25 (1956); *cf. Century Hardware Corp. v. Acme United Corp.*, 467 F.Supp. 350, 355–56 (E.D. Wis. 1979).

C. *The "Availability" Defense*

Boise argues that the prices it receives are available to dealers and therefore there is no statutory injury. In this context, Boise really makes two arguments. First, it urges that wholesale functional discounts are available to all purchasers that perform the wholesale function. In other words, a retailer who feels disadvantaged can simply become a wholesaler too. Boise's suggestion that all dealers could become dual distributors or wholesalers is impractical on its face, and contradicted by the record. The courts and the Commission have [32] long required that availability be practical. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025–26 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Dayton Rubber Co.*, 66 F.T.C. 423 (1964), *rev'd on other grounds sub nom. Dayco Corp. v. FTC*, 362 F.2d 180 (6th Cir. 1966). Lower prices are "unavailable" where a purchaser must alter his purchasing status before receiving them. *Dayton Rubber Co.*, 66 F.T.C. at 470.

The record shows that dealers do, in fact, perform wholesaler functions but do not receive the functional discounts that Boise enjoys. I.D.F. 375, 446–54, 522; I.D. 114–16. Moreover, some dealers have explicitly requested wholesaler discounts and have been denied them. The record identifies two dealers who specifically requested from three suppliers the discounts Boise receives, but were specifically denied them, on the grounds that the requesting dealers were not

wholesalers. I.D.F. 448. One manufacturer, Kardex, will not give dealers its wholesale functional discount unless they change their functional status, and will not give dealers this discount even when, as a courtesy, they sell to other dealers. I.D.F. 449.

The second prong of Boise's argument is that equally low prices were available to competing retail dealers from other suppliers. In essence, respondent urges an "alternative source" defense. *See generally,* 1 ABA Antitrust Section, The Robinson-Patman Act 110–16 (1983). Although a few courts appear to have recognized the defense, *see, e.g., Hanson v. Pittsburgh Plate Glass Industries, Inc.,* 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974), other courts have rejected it, *see,* [33] *e.g., Fowler Manufacturing Co. v. H. H. Gorlick,* 415 F.2d 1248, 1253 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970); *Wholesale Auto Supply Co. v. Hickok Mfg. Co.,* 221 F.Supp. 935 (D.N.J. 1963).[11] The defense "has not been successful in any of the dual function buyer cases." Beringer, "The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act," 31 *Bus. Lawyer* 783, 795 (1976). The alternative source defense presumes that businessmen act irrationally, by choosing to pay more to a supplier that discriminates against them than they could pay to an alternative source for the same goods. Instead, the continued purchases even in the face of discriminatory prices suggest that the alleged alternative sources are not competitive. If an alternative source defense is legally recognized, despite its presumption of buyer irrationality, it is critical to examine whether the alternative sources are, in fact, competitively equivalent. [34]

We need not reach the issue of whether an available alternative source negates a finding of price discrimination.[12] The record shows that equivalent goods were not available on equivalent terms from alternative suppliers. In the first place, even respondent's view of the matter does not show that alternative prices available to dealers were as low as the wholesale prices available to Boise that are the focus of this case. I.D.F. 11–14. Most of respondent's "evidence" on alternative suppliers was based on unsupported testimony that was vague and unreliable. *See, e.g.,* Williams Tr. 2364–68; I.D.F. 378–79, 382. Such evidence as there was did not show the availability of equivalent

[11] The Ninth Circuit in *Fowler* retreated from an earlier apparent acceptance of a version of an alternative source defense. *See Tri-Valley Packing Ass'n v. FTC,* 329 F.2d 694, 703–704 (9th Cir. 1964). The Seventh Circuit in *Purolator Products, Inc. v. FTC,* 352 F.2d 874, 882 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968), accepting the alternative source defense *arguendo,* found it inapplicable in that a different brand of products did not constitute an acceptable alternative source of supply. According to that reasoning, the "availability" defense would not insulate Boise here.

[12] The Commission's previous decision in *Ark-La-Tex Warehouse Distributors, Inc.,* 62 F.T.C. 1557 (1963), cannot be construed as acceptance of the alternative source defense by the Commission. In that matter the Commission simply requested that a hearing examiner determine whether an alternative source of supply was available to the disfavored customers. While indicating that the Commission wished evidence taken on the issue, the case cannot be read as reflecting anything more.

products in terms of quality, brand recognition, or consumer acceptance. I.D.F. 435–36, 442–44. There was no evidence showing that such alleged alternative supplies were available on the same terms found in existing seller/buyer relationships. Such vital terms include minimum order requirements, delivery times, order fill rates, promotional assistance, and sales personnel services. I.D.F. 68; C.P.F. 118–120. Judge Parker found, and we agree, that Boise had failed to prove the availability of alternative sources of goods of like grade and quality at equally low prices. Here, as in *Purolator* [**35**] *Products, Inc. v. FTC, supra,* at least some of the products had no commercially accepted substitutes. I.D.F. 435–45.

V. THE AFFIRMATIVE DEFENSES

Lastly, Boise urges that even if Complaint Counsel has established a *prima facie* case, it has failed to prove the absence of seller's defenses.

Assigning the burden of proving the absence of affirmative defenses has plagued buyer-liability litigation under Section 2(f) of the Act. The Commission has acknowledged that it has the burden of presenting evidence as to the absence of cost justification. *See National Parts Warehouse,* 63 F.T.C. 1692 (1963), *aff'd sub nom. General Auto Supplies, Inc. v. FTC,* 346 F.2d 311 (7th Cir.), *cert. dismissed,* 382 U.S. 923 (1965). However, the Commission does not have the burden of proving the absence of a meeting competition defense. *National Parts Warehouse, supra,* 63 F.T.C. at 1736–37; *but see Mid-South Distributors v. FTC,* 287 F.2d 512, 517 (5th Cir.), *cert. denied,* 368 U.S. 838 (1961); *cf. Great Atlantic & Pacific Tea Co. v. FTC,* 557 F.2d 971 (2d Cir. 1977), *rev'd on other grounds,* 440 U.S. 69 (1979). The Commission today reaffirms its prior decision in *National Parts Warehouse, supra.* The buyer is in the better position to know whether it has in fact received better offers from other sources. Nonetheless, even if we were to assign the burden to Complaint Counsel, that burden has been carried. Thus, [**36**] assignment of the burden of proof makes no difference to the determination of either issue.

A. *Meeting Competition Defense*

In *Falls City Industries, Inc. v. Vanco Beverage, Inc.,* 460 U.S. 428 (1983), the Supreme Court stated that the meeting competition defense *cannot* be invoked by simply proving "facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor." 460 U.S. at 439. Rather:

> The showing required is that the "lower price . . . *was made* in good faith *to meet*" the

competitor's low price. 15 U.S.C. § 13(b) . . . Thus, the defense requires that the seller offer the lower price in good faith *for the purpose* of meeting the competitor's price, that is, the lower price must actually have been a good-faith response to that competing low price.

Id. (emphasis in the original). One commentator has phrased the test as follows:

If the seller's lower price was given *because* of lower prices by a competitor, it is cognizable under the Section 2(b) proviso; if, on the other hand, the seller's lower price was quoted *because* of a preconceived pricing scale which is operative regardless of variations in competitor's prices, as in the 'basing-point' cases, his price was not genuinely made to meet a competitor's lower price and Section 2(b) cannot apply. Put another way, Section 2(b) presupposes a lower price *responsive* to rivals' competitive prices.

Rowe, *Price Discrimination Under the Robinson Patman Act* 234 (1962) (emphasis in the original). Boise urges that the Rowe test was rejected by the Supreme Court in *Falls City*, R.A.B. 45, [37] ignoring the fact that the Supreme Court cited Rowe's passage with approval, 460 U.S. at 439. Boise fails to meet this standard. It was accorded the favored discount because it was functionally characterized as a wholesaler.

The "benchmark" for evaluating whether discriminatory discounts were granted to meet competition is the good faith standard. *United States v. United States Gypsum Co.*, 438 U.S. 422, 455 (1978). Boise places considerable reliance on undetailed and conclusory statements from manufacturers to the effect that their prices were adopted to meet competition. Mere recitation of a meeting competition formula does not prove the requisite good faith, which is more than a sworn-to state of mind. In any event, Judge Parker was not persuaded by the manufacturers' statements, and neither are we. *See* I.D. 123–24. In *Falls City, supra,* the Supreme Court stated:

This Court consistently has held that the meeting-competition defense " 'at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.' " *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978), *quoting FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759–760 (1945).

460 U.S. at 438. These conclusory statements do not adequately demonstrate "that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors." *Id.* The key to showing that such a belief is held in good faith is the requirement that a seller undertake steps to verify the [38] actual existence of

competitive offers, short of direct communication with other sellers. *United States v. United States Gypsum,* 438 U.S. 422, 454–55 (1978); *see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1044–47 (9th Cir. 1981), *cert. denied,* 459 U.S. 825 (1982).

Judge Parker found that the manufacturers provided functional discounts to wholesalers because they sell to dealers, and that the discounts were nationwide and do not vary from region to region. I.D. 123. Moreover, the discounts were provided to all Boise distribution centers and, with few exceptions, they had remained unchanged for many years. I.D. 123. These discounts thus do not appear to be responsive to particular competitive circumstances, or even to a regional market function as in *Falls City;* instead, they are part of a "preconceived pricing scale which is operative regardless of variations in competitor's prices," *see* Rowe, *supra,* at 234. If the prices Boise paid were based on meeting competition on an areawide or even nationwide basis, there would still be need for proof that Boise's suppliers had verified the existence of lower competitive offers. There is no evidence of any such effort; the evidence is that Boise and other wholesalers received a wholesale functional discount not available to dealers that competed with Boise in sales to end-user customers. Accordingly, we agree with Judge Parker that under these facts, the only reasonable **[39]** conclusion is that the manufacturers' discounts were not adopted for the purpose of meeting competition, but to reward a level of trade.

Boise argues that "[c]omplaint counsel offered no evidence to establish Respondent's knowledge of the absence of the meeting competition defense." R.A.B. 51. Boise's argument is based on the mistaken belief that direct evidence of the absence of the defense must be presented. It need not. The Fifth Circuit in *Mid-South Distributors v. FTC,* 287 F.2d 512, 517–18 (5th Cir.), *cert. denied,* 368 U.S. 838 (1961), noted that the proof of respondent's knowledge of the absence of statutory defenses may have to be established from "indirect circumstantial inferences" because buyers will rarely have "committed the crudities to permit categorical and direct proof." Here, Boise knew of the systematic nature of its wholesaler's discount, because Boise had been receiving price lists showing the system for twenty years. Boise employees knew it received the discount because it had been classified as a wholesaler, I.D. at 127–28, and Boise offered not probative evidence that its discounts were otherwise responsive to lower competing offers. Manufacturers were obviously aware that Boise resold both as a wholesaler and retailer, and Boise knew that wholesaler discounts were not available to dealers with which it competed in making retail sales. A sophisticated buyer might be presumed to be culpable with

respect to the absence of the meeting competition defense where the more probable explanation of a discount was the wholesale function attributed to Boise but not its retail dealer competitors. Buyer Boise also [40] was best positioned to know if the price it was receiving was to meet a competing seller's price. *Automatic Canteen Co. v. FTC,* 346 U.S. 61, 79 n.23 (1953). A direct confession from Boise is not necessary to support a finding that Boise knew it could not support a meeting competition defense.

B. *Cost Justification Defense*

Judge Parker found "there are no significant differences in the methods by or quantities in which the products are sold or delivered to Boise and selected dealers." I.D. 121–22. The goods are not specially manufactured for Boise and hence do not yield savings in manufacturing cost. I.D.F. 462. Possible economies that could result if Boise purchased from or took delivery at a central location do not exist, because manufacturers deal separately with each of Boise's locations. *See National Dairy Products Corp. v. FTC,* 395 F.2d 517, 526 (7th Cir.), *cert. denied,* 393 U.S. 977 (1968); *American Motor Specialties Co. v. FTC,* 278 F.2d 225, 227–28 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960); *Moog Industries, Inc. v. FTC,* 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam,* 355 U.S. 411 (1958).

Judge Parker correctly observed:

> Although the totality of the purchases of all of Boise's distribution centers from a particular manufacturer over a certain period of time may, and probably does, exceed the purchases of any one of the selected dealers over the same period from the same manufacturers, such comparison is meaningless for purposes of analyzing cost savings since the products are sold and delivered to the individual centers. Thus, the proper comparison for this purpose is between each Boise distribution center which competes with [41] each selected dealer. CX's 1–6 reveal that in many cases dealers purchased quantities equal to or greater than those purchased by a competing Boise distribution center yet paid higher per unit prices than did the center.

I.D.F. 469.

Boise's distribution centers order individually, are individually served by salesmen on a regular basis, are billed and accounted for individually, and individually receive deliveries directly from manufacturers. I.D.F. 463, 464, 467; C.P.F. 699–700. Boise's distribution centers order by the same methods as dealers do, and manufacturers process and fill orders in the same manner, whether received from dealers or wholesalers. I.D.F. 465–66. Indeed, Judge Parker observed that Boise's purchases from its distribution centers, on which it receives a wholesale functional discount, on occasion are no greater, and may even be smaller, than the volume purchased during equivalent

periods of time by dealers. I.D.F. 469–83. Despite this evidence showing that manufacturers' dealings with Boise and with dealers are similar, and hence should involve similar costs, manufacturers offered conclusory testimony that the price differences were explained by cost differences. That testimony, unsupported by any analytical detail, can be discounted. Were the manufacturers to testify that the differences were not cost-justified, that admission could expose them further to seller liability under Section 2(a), *cf.* I.D. 120. [**42**]

There is no substantial support for the claim that Boise or anyone else believed that the additional wholesaler discounts were adopted only to make due allowances for cost differences. The demonstrated similarity in manufacturers' methods of dealing with Boise and with dealers shows that the only conceivable cost difference would be related to volume. However, most manufacturers have separate volume discount schedules in addition to the wholesaler discount. Nevertheless, Boise would receive wholesaler discounts even on purchases in smaller quantities than its disfavored dealer competitors. I.D.F. 484–85. Even where an order by a Boise distribution center is larger than an order by a dealer, the supplier's cost of filling such an order does not differ between these customers. I.D.F. 466. Boise's acquisitions of office supply dealers made it aware that suppliers were granting it a functional discount unrelated to volume.

> For example, [Boise] acquired a Boston dealer, Dennis Office Supply (Tr. 4435–36) which was receiving dealer prices. After Boise meshed its buying practices with those of Dennis (CX 970, p. 124), it is a reasonable inference that it became aware that although the new distribution center's volume of purchases and method of buying from the six manufacturers (Tr. 4443–45) did not differ from when Dennis was given the dealer price, the center immediately qualified for the wholesale discount, a discount which it knew could not be cost-justified.

I.D.F. 487. Clearly, Boise, with its twenty years of experience in the industry, knew it was receiving a favored price because of its functional classification as a wholesaler and not because its favored treatment was cost-justified. Indeed, Boise's Product [**43**] Planning and Development Manager testified that he could not identify any aspect of a manufacturer's cost that differed in processing two similarly sized orders from a dealer and from a Boise distribution center. Bazant Tr. 4906–11. We find that Boise had knowledge that the cost justification defense was unavailable.

Nonetheless, Boise asserts that it is "enigmatic" how a customer who performs selling and delivery functions for a manufacturer could accurately estimate the cost savings to the manufacturer. R.A.B. 52. Costs, according to respondent, are "subjective in their character;" a customer could not be privy to the seller's managerial decision-mak-

ing since it necessarily involves "experience and hunches and acumen." R.A.B. 52. It is important to understand that Boise's argument, if accepted, would mean that Section 2(f) of the Robinson-Patman Act would be effectively repealed. Neither the Government nor a private plaintiff could ever successfully wage a buyer liability case since they could never prove that a buyer knew its receipt of favored treatment was not cost-justified. Congress has not repealed Section 2(f), and we decline Boise's invitation to do so by disparaging cost estimates as "subjective."

The Supreme Court addressed this very issue of assessing costs in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79–80 (1953). There the Court observed:

> Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified. But *trade experience* in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution. By way of example, a [44] buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified. The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. (Emphasis added.)[13]

The six manufacturers deal with each of Boise's distribution centers individually, selling to, accounting for, delivering to, and billing each center separately. Methods of service to Boise and dealers do not differ. Likewise, the quantities in which Boise's distribution centers purchase are often similar to the quantities that the dealers purchase. Boise is familiar with the methods used to serve dealers and the quantities purchased by dealers from its acquisition of office supply dealers, and from its own experience in selling to and competing with dealers as a [45] dual distributor. This trade experience fully supports the inference that Boise knew there was no basis for a cost justification defense.

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[13] Even if the costs of manufacture, sale and delivery to Boise were somewhat less than the costs of manufacture, sale and delivery to dealers, it would be of no avail to Boise. The Supreme Court stated in *Automatic Canteen*, *supra*, 346 U.S. at 80, that:

> The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

Here the price differential is exceptionally large, generally ranging from 5% to 33%. Such substantial discriminations could not reasonably be thought to be justified by any slight cost savings to the manufacturer in dealing with Boise.

VI. ORDER

Boise's objections to the order entered by Judge Parker are not well-taken. We perceive no serious questions as to the meaning and application of this unremarkable order. It is not a company-wide order, but instead is limited to Boise's office products business, the part of Boise's corporate operation that was the subject of the trial. The division affected is only a small part of Boise's total operation. Boise is not required to police thousands of suppliers' other dealings; instead, its obligations are determined by what it knows about prices to other dealers, not what it might find out through detective work. The application to all of Boise's office products business, rather than just the particular suppliers and distribution centers that were the focus of detailed proof at the trial, is fully supported by the record and the precedents. The practices are not isolated, but endemic. Finally, in a case such as this dealing with violation of a clear conduct prohibition, we believe it is not necessary or advisable to limit the order's duration.

We modify the Administrative Law Judge's order in two respects, however. Paragraph II, read literally, could be thought erroneously to apply to office products other than those Boise buys for sale to end-users. Boise has requested that the order be modified to make clear that it applies only to office products Boise sells to end-users in competition with other [**46**] retailers, and does not apply to goods ultimately resold to dealers. R.A.B. 56. Complaint Counsel has not objected to this requested modification. Accordingly, to eliminate the suggestion of overbreadth, Paragraph II of the order will read as follows:

It is further ordered, That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products to end-users.

Finally, Paragraph V does not clearly assign responsibility for determining when compliance reports should be submitted, after the first one. Clearly, this should be a matter for the Commission to determine. Therefore, Paragraph V of the order will read as follows:

It is further ordered, That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

VII. CONCLUSION

For the foregoing reasons, we adopt the findings, conclusions, and order of the Administrative Law Judge issued February 14, 1984, except for the modifications to Paragraphs II and V of the order described immediately above.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to affirm the Initial Decision. Accordingly, the appeal of Boise Cascade Corporation is denied, and

It is ordered, That the following order to cease and desist be, and the same hereby is, entered:

I.

The following definitions shall apply in this order:

A. *Boise Cascade* shall mean Boise Cascade Corporation, its divisions and subsidiaries, its officers, directors, agents and employees, and its successors and assigns.

B. *Office Products* shall mean furniture and supplies commonly used in offices such as those which are sold or distributed by Boise Cascade Corporation's Office Products Division. [2]

C. *Net Price* shall take into account all discounts, rebates, allowances, deductions or other terms and conditions of sale.

II.

It is further ordered, That Boise Cascade shall, in connection with the offering to purchase or purchasing in commerce, as "commerce" is defined in the Clayton Act, of office products for resale, cease and desist from directly or indirectly inducing, receiving or accepting

from any seller a net price that Boise Cascade knows or has reason to know is below the net price at which office products of like grade and quality are being offered or sold by such seller to other purchasers with whom Boise Cascade is competing in the resale or distribution of said office products to end-users.

III.

It is further ordered, That Boise Cascade shall, within sixty (60) days of the effective date of this order, distribute a copy of this order to each of its suppliers of office products.

IV.

It is further ordered, That Boise Cascade shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate structure of Boise Cascade, such as the creation or dissolution of subsidiaries or divisions, or any other change in the corporation, which may affect compliance obligations arising out of the order. [3]

V.

It is further ordered, That Boise Cascade shall, within ninety (90) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as the Commission may from time to time require to assure compliance with the terms and conditions of this order.

IN THE MATTER OF

SUNBEAM CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3181. Complaint, Feb. 11, 1986—Decision, Feb. 11, 1986

This consent order requires a Pittsburgh, Pa. marketer of Oster brand air cleaners, among other things, to cease misrepresenting the ability of air cleaners to eliminate or help eliminate indoor pollutants. Additionally, respondent is required to have competent and reliable substantiation for all future claims about its products' efficacy.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Harold G. Sodergren.*

For the respondents: *Edward J. Momkus,* in-house counsel, Oak Brook, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sunbeam Corporation, a corporation, hereinafter sometimes referred to as "Sunbeam" or as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a Delaware corporation with its principal place of business at 2 Oliver Plaza, Pittsburgh, Pennsylvania.

PAR. 2. Respondent, through its Oster Division, manufactures, advertises, offers for sale and sells electric air cleaning appliances, including but not limited to the Oster Models "402" and "404" (hereinafter referred to as "air cleaning appliances").

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertising for air cleaning appliances in national magazines, newspapers and catalogues, and radio and television broadcasts. In addition, respondent has distributed product brochures and other

sales literature directly to consumers or to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 5. Typical of respondent's statements and representations, but not necessarily inclusive thereof, are those found in the advertisements and promotional materials attached hereto as Exhibits A, B, C, D and E.

PAR. 6. Through the use of the statements and representations referred to in Paragraph Five, and other statements and representations contained in advertisements and promotional materials not specifically set forth herein, respondent has represented, and now represents, directly or by implication, the following claims:

a. The air cleaning appliances effectively help clean or effectively help remove formaldehyde gas, gases from tobacco smoke, and/or other gases from the air people breathe under household or office conditions.

b. The air cleaning appliances remove or eliminate a substantial amount of formaldehyde gas, gases from tobacco smoke, and/or other gases from the air people breathe under household or office conditions.

c. The air cleaning appliances "chemically destroy" formaldehyde gas, gases from tobacco smoke, and/or other gases from the air people breathe under household or office conditions.

PAR. 7. In truth and in fact, the direct or implied representations set forth in Paragraph Six are and were false and misleading, for reasons including but not limited to the following:

a. Respondent's air cleaning appliances do not effectively help clean or effectively help remove formaldehyde gas, gases from tobacco smoke, or other gases from the air people breathe under household or office conditions.

b. Respondent's air cleaning appliances do not remove or eliminate a substantial amount of formaldehyde gas, gases from tobacco smoke, or other gases from the air people breathe under household or office conditions.

c. Respondent's air cleaning appliances do not "chemically destroy" formaldehyde gas, gases from tobacco smoke, or other gases from the air people breathe under household or office conditions.

Therefore the direct or implied statements and representations set forth in Paragraph Six are false and misleading.

PAR. 8. Through the use of the advertisements and promotional materials referred to in Paragraph Five, and others not specifically set forth herein, respondent has represented, directly or by implica-

tion, that it possessed and relied upon a reasonable basis for those representations.

PAR. 9. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations because, *inter alia,* respondent either did not conduct appropriate tests or did not properly extrapolate test results by generally accepted procedures to advertised room, household or office conditions. Therefore, respondent's representations are false and misleading.

PAR. 10. The acts and practices of respondent as alleged in this complaint constitute unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

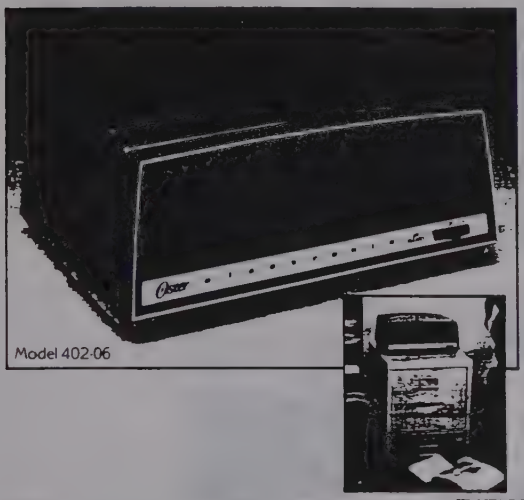
EXHIBIT A–1

Oster deluxe triple-cleaning

Electronic Air Cleaners

with Electrostatic Precipitators

the professional method of cleaning the air of visible and invisible pollutants



For Use in Homes and Small Offices

Electronic Air Cleaner
The basic unit can clean 2016 cubic feet of air twice per hour (14' x 18' x 8'). The two-speed, solid-state power module gives quiet operation on Low, and an effective high-volume movement on High. The efficient centrifugal air mover uses only 35 watts to keep your energy consumption down. Front intake, top clean air vent, and light weight (10 lbs.) combine for easy shelf or table placement.

Uses: Homes, sick rooms, small offices, waiting rooms, beauty shops, barber shops, labs, darkrooms.

Model 402-06 Brown Woodgrain

INSIDE AIR MAY BE UP TO THREE TIMES DIRTIER THAN OUTSIDE AIR

According to recent studies, the air in your home, place of business or anywhere people gather, is probably up to 3 times dirtier than outside air — so dirty that up to 2 billion particles of pollutants exist in just one cubic foot of air! These pollutants include pollen, dust, smoke, bacteria, viruses, gases, and odors. 90% of these pollutants are so small they are invisible. These invisible particles are critical since visible particles fall from the air by themselves in five minutes or less. Invisible particles can remain suspended without a sophisticated cleaning system.

IT'S THE SAME SYSTEM USED IN U.S. SUBS

All Oster Electronic Electrostatic Precipitator Air Cleaners benefit from Oster's years of expertise as a marketer of commercial air cleaners — the kind you see in restaurants and other public gathering places. Further, this unique air cleaning system was designed and engineered by Oster's development engineering personnel, in collaboration with the people who supply U.S. Navy submarines. This enclosed environment has an abnormally high concentration of stagnant and dirty air. Now, that technology, developed for the U.S. Navy and being utilized commercially, is available for home and office use.

IT HELPS REMOVE POLLEN, DUST, SOOT, MOLD SPORES, LINT

Here's how the Oster triple-cleaning system works: The first mechanical pre-filter helps remove the larger visible pollutants. Some of these are pollen, dust, soot, mold spores, lint. This filter is easily serviced by washing in soapy water every 6 to 8 weeks.

IT HELPS REMOVE INVISIBLE POLLUTANTS, SUCH AS SMOKE

The second filter is the incredible electronic electrostatic precipitator, which uses collecting plates that are constantly charged by a solid-state power source. This permanent filter helps remove the critical invisible pollutants (90% of pollutants in the air are invisible). It differs greatly from the electrostatic fiber filters in some cleaners which are charged only before they are put in the unit. (The one-time electrostatic charge dissipates with use and the filter must be replaced.) Bacteria, insecticide dust, tobacco smoke, cooking smoke and film, even certain viruses are among those invisible pollutants removed. The filter is so extraordinary, it actually helps remove pollutants from the air up to 500 TIMES SMALLER* (one two-millionth of an inch) than inexpensive consumer air fresheners and purifiers! This cell also is easily serviced and should be washed in soapy water, or a dishwasher, every 6 to 8 weeks for household use (more often for commercial use).

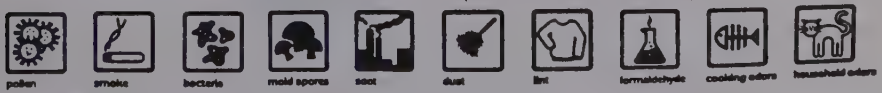
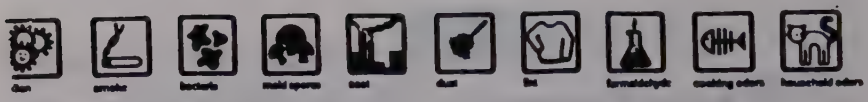


EXHIBIT A–2

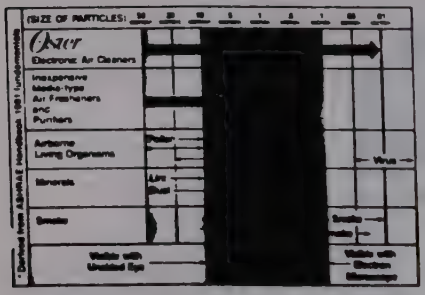


CHEMICALLY DESTROYS ODORS

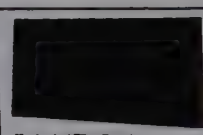
he third specially formulated charcoal/chemical filter ompletes the cleaning process with a unique contamination control. This filter absorbs gases and odors from the air and *chemically destroys* them! Formaldehyde (a gas released from insulation, paneling, wallboard, plywood), pet odors, bathroom odors, kitchen and cooking odors like fish, garlic, and vinegar are removed. Even pungent chemical odors caused by various hair "perm" products are neutralized. Compare this with the ordinary* consumer air fresheners and purifiers that simply mask unpleasant odors by adding fragrances — these fragrances actually increase the pollution level. This filter remains effective for 3 to 6 months. Replacement filters are easily installed.

YOU'LL DUST LESS OFTEN/SAVE ON CLEANING COSTS

Oster's Electronic Air Cleaning System will help remove pollutants so effectively that walls, furniture, drapes, windows, carpets need less cleaning. You do less dusting. addition, it helps you protect expensive audio and video equipment from damage-causing dust.



Triple-Cleaning System



Mechanical Filter (foam)
Helps remove larger particles: pollen, dust, soot, etc. Washable in sink, reusable

Electronic Filter (electrostatic precipitator)
Collects microscopic particles (invisible to the unaided eye), tobacco and cooking smoke. Washable in sink or dishwasher. Plates are constantly charged by a solid state power source.

Charcoal/Chemical Filter
Helps remove lingering gases (sulfides, oxides, formaldehyde, etc.) and unpleasant odors (paint, pet, tobacco, and cooking odors).

Model 404-06

Electronic Air Cleaner

The deluxe model can clean 2016 cubic feet of air six times per hour (14' x 18' x 8'). The two speed solid state power module allows you to run the unit on High when needed or on Low during quiet periods. The efficient radial air mover uses only 80 watts to keep your energy consumption down. Front air intake and rear clean air vent.

Uses: Homes, sick rooms, offices, waiting rooms and lobbies, beauty shops, barber shops, labs, darkrooms, stereo stores.

Model 404-06 Brown Woodgrain

Oster
Division of Sunbeam Corporation

Printed in U.S.A.

EXHIBIT B–1

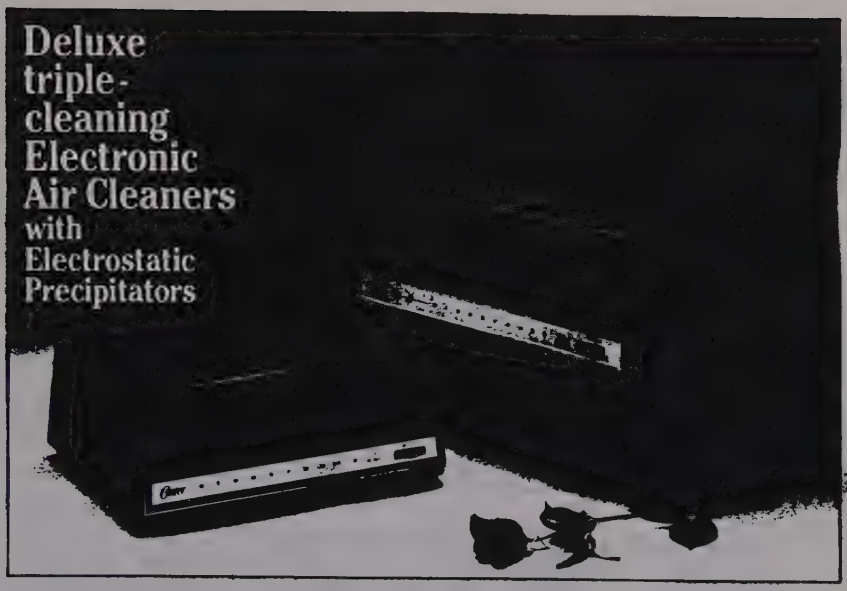
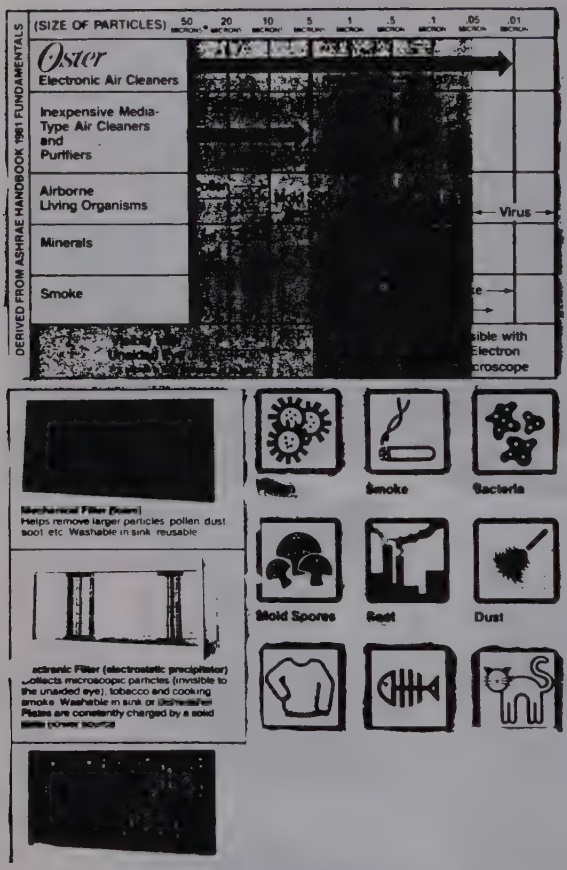

Deluxe
triple-
cleaning
Electronic
Air Cleaners
with
Electrostatic
Precipitators

EXHIBIT B–2


DERIVED FROM ASHRAE HANDBOOK 1981 FUNDAMENTALS
(SIZE OF PARTICLES) 50 MICRON 20 MICRON 10 MICRON 5 MICRON 1 MICRON .5 MICRON .1 MICRON .05 MICRON .01 MICRON
Oster
Electronic Air Cleaners
Inexpensive Media-Type Air Cleaners and Purifiers
Airborne Living Organisms
Minerals
Smoke
Mold
Virus
Unaided Eye
Electron Microscope
Mechanical Filter (foam)
Helps remove larger particles pollen dust soot etc Washable in sink reusable
Smoke
Bacteria
Mold Spores
Dust
Pollen
Electronic Filter (electrostatic precipitator)
Collects microscopic particles (invisible to the unaided eye), tobacco and cooking smoke Washable in sink or dishwasher Plates are constantly charged by a solid

Electronic Air Cleaner Specifications

The 70 CFM unit can clean 2016 cubic feet of air twice per hour (14" x 18" x 8"). The two-speed solid state power module gives quiet operation on Low, and an effective high volume movement on High. The efficient centrifugal air mover uses only 40 watts to keep your energy consumption down. Front intake, top clean air vent, and light weight combine for easy shelf or table placement.

Uses: Homes, small offices, waiting rooms, beauty shops, barber shops, labs, darkrooms

402-06 Woodgrain Ship. wt. 10 lb.

Charcoal Replacement Filter for 402-06 (8-5/8" x 4-1/4" x 1/2")

939-43 Ship. wt. 1/4 lb.

EXHIBIT C

Oster

OSTER CHARCOAL/CHEMICAL FILTER HELPS DESTROY ODORS AND CONTAMINANTS LISTED BELOW:

OXIDES

nitrogen dioxide	toxic, irritating gas, smog component, tobacco smoke
nitrogen oxide	toxic, irritating gas, smog component
sulfer dioxide	toxic, irritating gas, smog component

MERCAPTANS

butyl mercaptan	stench (skunk odor)
ethyl mercaptan	stench (similar to butyl mercaptan)
methyl mercaptan	odorant in natural gas

ALKALOIDS

indole	putrefaction of proteins
nicotine	tobacco smoke
skatole	putrefaction of proteins —feces

AMINES

ammonia	sharp odor, urine, tobacco smoke
cadaverine	bacterial decomposition of proteins
putrescine	bacterial decomposition of proteins
trimethylamine	fish odor

SULFUR COMPOUNDS

allyl disulfide	garlic oil
carbon disulfide	organic solvent (odor similar to hydrogen sulfide)
hydrogen sulfide	rotten eggs, feces, tobacco smoke
sulfur dioxide	heavy, oppressive odor, smog component

ORGANIC ACIDS

acetic acid	vinegar
butyric acid	odor of rancid butter
caprylic acid	decomposition of animal fats and oils
isovaleric acid	decomposition of animal fats and oils
propionic acid	sharp odor (similar to vinegar)

ALDEHYDES

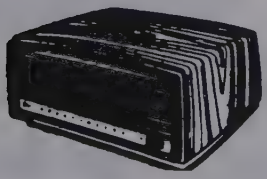
acetaldehyde	sharp, acrid odor
butyraldehyde	sharp, acrid odor
acrolein	pungent odor, tobacco smoke

PHENOLS

chlorophenol	germicide
cresol	prime ingredient in creosote
phenol	germicide

OTHER

mercury	cumulatively toxic vapor
ozone	irritating odor at high concentrations, smog component
tetrachloroethylene	ether-like odor
trichloroethylene	sweet-smelling solvent
turpentine	paint remover
vinyl chloride	plastics industry chemical
hydrogen cyanide	toxic gas, tobacco smoke



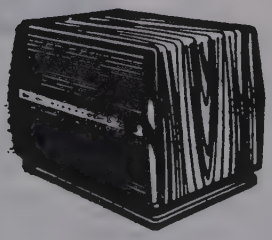
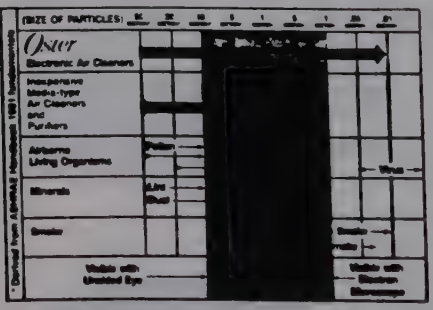


EXHIBIT D

Think of it as a breath of fresh air. 24 hours a day.

Recent studies have shown that recirculated air in well-insulated buildings can be up to three times dirtier than the air outside. But there's good news, too. Now you can give your home or office a breath of fresh air, 24 hours a day, with the new Oster Electronic Air Cleaner. Oster's triple-cleaning system was engineered by the people who supply air cleaners to the U.S. Navy. It is one of the most efficient air cleaning systems available for use in the home.

The Oster Electronic Air Cleaner filters air mechanically, electronically and chemically, and helps remove odors and particles as small as .01 micron (less than four ten-millionths of an inch across)...pollutants up to 500* times smaller than those removed by inexpensive air cleaners and purifiers. It helps remove smoke, grease, soot and dust particles, pollen and mold spores, bacteria, and even some viruses from the air you breathe, leaving it cleaner and fresher smelling. Helps protect costly stereo equipment from damaging dust — and you'll find yourself dusting less often, too!



Here's how Oster's triple-cleaning system works: Large particles (over 10 microns) are eliminated by a mechanical filter. Smaller particles (down to .01 micron) are captured by an electronically powered electrostatic precipitator that gives each particle a positive electrical charge and then traps it on a negatively charged plate. The air then passes through a charcoal and odoroxidant filter, which helps trap odors and gases and chemically destroys them.

The Oster Electronic Air Cleaner's attractively styled, simulated wood-grain cabinet blends with nearly any decor. And the two speed, solid state power module is designed for years of quiet, dependable operation. Two models to choose from. The basic unit can clean 2,016 cu. ft. of air (a 14' x 18' x 8' room) twice per hour . . . the deluxe model can clean 2,016 cu. ft. of air six times per hour. Both models give you cleaner, fresher smelling air 24 hours a day.

For your nearest Oster Air Cleaner dealer, call toll free 800-356-7837. In Wisconsin, 414-332-8300.

The NEW Oster Electronic Air Cleaner.

Oster

Division of Burgess Corporation
Milwaukee, Wisconsin 53217

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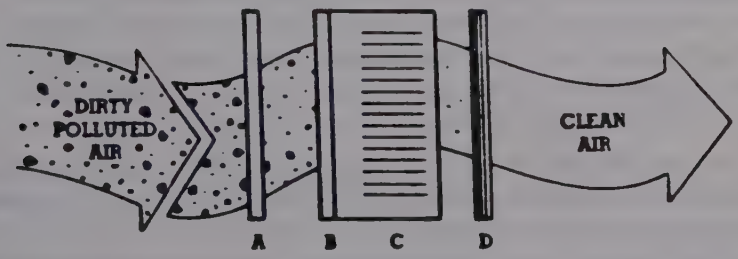
EXHIBIT E

HOW THE OSTER AIR CLEANER WORKS

Your electronic air cleaner is a highly efficient dirt remover and collector. It helps remove dust, pollen, fumes, smoke and other microscopic particles from the air by the use of a triple filtration system.

1. **Dirty air is drawn into the unit by a fan. A foam filter (A) helps remove the larger visible particles—dust, pollen, and lint.**
2. **The smaller particles pass through an electrical field in the electronic cell (B) and are given a positive electrical charge.**
3. The charged particles pass through a series of oppositely charged collecting plates (C) in the cell and are attracted to and held by the negatively charged plates until they are removed by washing.
4. The clean air then passes through a special charcoal and chemical filter (D) which helps absorb and destroy gases in the air that cause odors



IMPORTANT SAFETY INSTRUCTIONS

This unit is equipped with a polarized attachment plug (the plug having one blade wider than the other). This plug will fit in a polarized outlet only one way. This is a safety feature. If you are unable to insert the plug fully in the outlet, reverse the plug. If it still will not fit, contact a qualified electrician. Never use with an extension cord unless plug can be fully inserted. Do not attempt to defeat the safety purpose of the polarized plug.

Decision and Order

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and also containing waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sunbeam Corporation is a Delaware corporation with its offices and principal place of business located at 2 Oliver Plaza, Pittsburgh, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

1. The term *indoor air contaminants* includes, but is not limited to, formaldehyde gas; other gases (*e.g.*, sulfides, oxides); acrolein, acetaldehyde, carbon monoxide and other gases from tobacco smoke; and other gases associated with common household odors (*e.g.*, from cooking, paint, or pets).

2. The term *performance characteristic* includes, but is not limited to:

a. the power, strength or capacity of the appliance or equipment, whether expressed in terms of volume of air circulated or in terms of room sizes;

b. the cleaning, filtration, or removal ability, or the speed of operation of the appliance or equipment, whether expressed generally or in terms of a specific contaminant, in terms of the filtering media or mechanism, or in terms of the appliance itself;

c. the speed of operation; or

d. the comparative power, strength, filtration or cleaning capacity, removal ability, or speed of operation.

PART I

It is ordered, That respondent Sunbeam Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the ability of any air cleaning appliance or equipment to clean, eliminate or remove any indoor air contaminant.

B. Misrepresenting in any manner, directly or by implication, the ability of any air cleaning appliance or equipment to clean, eliminate or remove any quantity of indoor air contaminants.

C. Representing, directly or by implication, contrary to fact, that respondent's models "402" or "404" air cleaners can effectively help clean, effectively help remove, chemically destroy, or remove or eliminate a substantial amount of, formaldehyde gas, gases from tobacco smoke, or other gases from the air people breathe under household or office conditions.

D. Representing, directly or by implication, any performance characteristic of any air cleaning appliance or equipment unless at the time of making such representation respondent possesses and relies upon a reasonable basis for such representation. A reasonable basis shall consist of competent and reliable evidence which substantiates such representation. To the extent the evidence of a reasonable basis consists of scientific or professional tests, experiments, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, experiments, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner

by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

E. Representing, directly or by implication, that any air cleaning appliance or equipment will perform under a set of conditions, including household or office conditions, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific tests which either relate to those conditions or which have been extrapolated by generally accepted procedures to those conditions.

PART II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any air cleaning appliance or equipment, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order;

2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of two (2) years from the date respondent's advertisements, sales materials, promotional materials or post-purchase materials making such claim or representation were last disseminated.

PART III

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, and to each of its agents, representatives or employees engaged in the preparation and placement of advertisements or other sales materials relating to any air cleaning appliance or equipment.

PART IV

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the respondent such as dissolution, assignment or sale, resulting in the emergence of a successor, the creation or dissolution

of subsidiaries, or any other change in the respondent which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That respondent shall, within ninety (90) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order.

IN THE MATTER OF

THE ELECTRICAL BID REGISTRATION SERVICE OF MEMPHIS, INC., ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9183. Complaint, Aug. 6, 1984—Final Order, Feb. 12, 1986

This final order requires a Memphis, Tenn. bid depository set up by electrical subcontractors, among other things, to cease taking disciplinary action against firms that negotiate prices after bidding is closed or that accept a contract at a price other than that filed with the registry. Additionally, respondents may not require firms using the registry to deal only with other registry participants and cannot restrict in any way negotiations between electrical subcontractors and general contractors. Further, respondents are required to reinstate any firm it suspended for violation of the illegal rules and remove the illegal provisions from its by-laws or other rules.

Appearances

For the Commission: *Truett M. Honeycutt, Douglas B. Brown* and *Harold E. Kirtz.*

For the respondents: *Carl H. Langschmidt, Jr., Boone, Wellford, Clark, Langschmidt & Apperton,* Memphis, Tenn., for respondents The Electrical Bid Registration Service of Memphis, Inc., C.H. Dennis, Jr., James L. Overton, Wayne A. Allen and Jack Gross. *James W. Watson* and *G. Patrick Arnoult, Watson, Arnoult & Quinn,* Memphis, Tenn. for respondent The National Electrical Contractors Association, Memphis Chapter.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Electrical Bid Registration Service of Memphis, Inc., a corporation, and C. H. Dennis, Jr., individually and as an officer and director of said corporation, and James L. Overton, Wayne A. Allen, and Jack Gross, individually and as directors of said corporation, and The National Electrical Contractors Association, Memphis Chapter, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public

interest, hereby issues its complaint stating its charges in that respect as follows:

Definitions

(1) For the purposes of this complaint, the following definitions shall apply:

(a) The *greater Memphis area* consists of Memphis, Tennessee and some or all of the following twenty-three counties in Tennessee, Arkansas, and Mississippi: Shelby, Fayette, Lauderdale, and Tipton counties, Tennessee; Crittenden, Phillips, [2] St. Francis, Lee, Cross, and Mississippi counties, Arkansas; and DeSoto, Marshall, Benton, Tunica, Tate, Loachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Granada counties, Mississippi; and

(b) The term *substantial* as applied to building construction contracts or projects means those contracts or projects for which the electrical subcontract is expected to be in excess of $5,000.

Parties

(2) Respondent the National Electrical Contractors Association, Memphis Chapter (hereinafter referred to as the Memphis Chapter) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. The Memphis Chapter was organized and is operated in substantial part for the pecuniary benefit of its members, who are electrical subcontractors.

(3) Respondent the Electrical Bid Registration Service of Memphis, Inc, (hereinafter referred to as the Registry) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. As set forth below, the Registry was founded by the Memphis Chapter and its members, who (a) established the Registry as a corporation with a self-perpetuating board of directors, (b) appointed all of the members of the Registry's first board of directors, and (c) selected electrical subcontractors who were Memphis Chapter members to fill a majority of the seats on the Registry's board. A majority of the Registry's board has always consisted of electrical subcontractors who are Memphis Chapter members. The Registry was organized and is operated in substantial part for the benefit of the Memphis Chapter's members, who are de facto members of the Registry.

(4) Respondent C. H. Dennis, Jr. is an officer and director of the Registry, and respondents James L. Overton, Wayne A. Allen, and

Jack Gross are directors of the Registry. These individuals are sometimes referred to collectively as the individual respondents. They formulate, direct, and control the acts and practices of the Registry, including the acts and practices hereinafter set forth. Their address is the same as that of the Registry. Each individual respondent represents an electrical subcontractor that is a member of the Memphis Chapter.

Commerce

(5) Respondents maintain, and have maintained, substantial courses of business, including the acts and practices as [3] hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Factual Allegations

(6) Firms and government entities often engage independent contractors to perform building construction work, and they often use competitive bidding to select a general contractor for construction of a project and enter into a prime contract with the general contractor for such work. When competitive bidding is used, the firm or government entity (commonly referred to as the awarding authority) frequently requests prime bids from general contractors based on plans and specifications depicting the work to be done and the materials to be furnished. The awarding authority also sets a date for submissions and opening of the prime bids made by the general contractors.

(7) In preparing a prime bid on a building construction project, a general contractor usually calculates the approximate cost of the work to be done by examining the specifications and estimating labor, materials, overhead, and profit. General contractors often do not perform specialty work, such as electrical work, and in order to prepare their prime bids general contractors generally obtain sub-bids from subcontractors relating to their particular specialties.

(8) Absent a bid depository or other mechanism that restricts the submission of bids by subcontractors to general contractors, the process of competitive bidding for building construction contracts can operate in the following manner. Each general contractor can obtain sub-bids from a variety of competing subcontractors in order to obtain what he considers the best proposal in terms of price and quality. Similarly, each subcontractor can submit sub-bids to a variety of competing general contractors. Until the deadline for the submission of prime bids to the awarding authority, general contractors and electrical subcontractors can engage in negotiations during which the subcontractors have an opportunity to revise their sub-bids. (Such negotiations are commonly referred to as pre-award bid shopping and

bid peddling.) After a general contractor has been awarded the prime contract, the winning general contractor and all interested subcontractors can engage in further negotiations, during which the general contractor may seek the most favorable price for the type and quality of the specialty work to be done, and subcontractors may attempt to win a subcontract by submitting lower acceptable bids. (Such further negotiations are commonly referred to as post-award bid shopping and bid peddling.)

(9) In the greater Memphis area, the process of competitive bidding for building construction contracts generally operates in the manner described in Paragraph Eight, except with respect to the submission of sub-bids by electrical subcontractors to general [4] contractors for substantial building construction contracts. The process by which electrical subcontractors submit bids and otherwise compete to be selected to work on substantial building construction projects in the greater Memphis area operates in a different manner because it is and has been governed by the rules of bid depositories established and maintained by electrical subcontractors, as set forth in Paragraphs Ten-Thirteen.

(10) Since approximately 1956, electrical subcontractors in the greater Memphis area have been engaged in a combination or conspiracy to restrict the manner in which they compete to be selected to work on substantial building construction contracts. The combination or conspiracy has been carried out by eliminating the open competitive process described in Paragraph Eight, which the electrical subcontractors believe puts unfair pressure on them to lower their bid prices, and instead establishing and operating bid depositories whose rules, policies, and practices place unreasonable restrictions on competition among electrical subcontractors. The Memphis Chapter and the Registry have participated in this combination or conspiracy, both as combinations of electrical subcontractors and as co-conspirators. Each of the individual respondents has participated in this conspiracy as a co-conspirator in his actions as an officer and/or director of the Registry.

(11) In furtherance of this combination or conspiracy, the Memphis Chapter has engaged in the following acts or practices, among others:

(a) In approximately 1956 the Memphis Chapter formed an in-house bid depository, and the Memphis Chapter operated this bid depository until 1976. The Memphis Chapter's depository established a deadline for electrical subcontractors' filing of bids and prohibited electrical subcontractors from offering a lower price or otherwise amending their bids after the deadline. In addition, Memphis Chapter members

were required to use the depository on all jobs handled by the depository;

(b) In 1976, the Memphis Chapter discontinued its in-house bid depository and formed a new bid depository, the Registry, which would be a separate corporation; and

(c) Since 1976, the Memphis Chapter and its members have supported and/or controlled the Registry.

(12) In furtherance of this combination or conspiracy, the Registry and the individual respondents have engaged in the following acts or practices, among others:

(a) The Registry has operated in accordance with the following rules, policies, and practices:

(i) The Registry has a deadline for electrical subcontractors' registering of bids and prohibits electrical [5] subcontractors from offering a lower price after the deadline. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(ii) The Registry requires general contractors who accept the delivery of registered bids to agree that they will not award an electrical subcontract to any firm that did not have a bid registered with the Registry, and that all such awards must be at the price contained in the registered bid. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(iii) An electrical subcontractor who uses the Registry on any particular job may not submit any bids for that job to any general contractor who is not using the Registry for that job; and

(iv) A general contractor who uses the Registry on any particular job may not accept a bid for that job from any electrical subcontractor who did not use the Registry on that same job unless the general contractor registers the non-participating electrical subcontractor's bid with the Registry before the Registry's deadline for registering bids.

(b) The Registry has implemented and enforced these rules, policies, and practices in the following manner:

(i) The Registry has imposed or threatened to impose sanctions, including suspension from the Registry and imposition of fines or liquidated damages; and

(ii) The Registry has notified all general and electrical contractors who regularly use the Registry of the identity of parties that have been sanctioned by the Registry.

(13) Most electrical subcontractors in the greater Memphis area are members of the Memphis Chapter. The Registry staff, which is also the staff of the Memphis Chapter, chooses what jobs will be on the

Registry, and most competitively bid substantial building construction jobs in the greater Memphis area are selected to be on the Registry. When a job is on the Registry, electrical subcontractors generally use the Registry if they desire to bid on the job. Because the Registry's rules prohibit electrical subcontractors using the Registry from dealing with general contractors who are not using the Registry, general contractors in the greater Memphis area are as a practical matter required to use the Registry, whether or not they would prefer to use the Registry or believe the Registry provides any benefits, if they want to receive bids from the electrical subcontractors who desire to bid on the job. [6]

Purposes and Effects

(14) The actual or probable purposes or effects of the combination or conspiracy alleged in Paragraph Ten and the acts and practices alleged in Paragraphs Eleven-Thirteen are or have been to restrict competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area in the following ways, among others:

(a) General contractors have been restrained from seeking, negotiating for, and obtaining bids lower than those submitted by electrical subcontractors through the Registry;

(b) Electrical subcontractors have been restrained from offering lower prices or otherwise amending the bids that they have submitted through the Registry;

(c) Price negotiations and contractual relationships between willing general contractors and electrical subcontractors have been prevented by rules against dealing with firms not using the Registry;

(d) There is pressure on general contractors to use the Registry whether or not they would prefer to use the Registry or believe that the Registry provides any benefits;

(e) Firms that have been suspended from the Registry for engaging in price competition prohibited by the Registry's rules have been prevented from submitting bids to or obtaining bids from other firms using the Registry on particular jobs;

(f) There is an increased likelihood that electrical subcontractors may engage in bid rigging or otherwise agree not to compete on the basis of price; and

(g) The cost of electrical subcontracting services has been increased.

Violations

(15) Respondents' combination or conspiracy, and the acts or practices in furtherance thereof, have had or are having the purpose or

effect of restraining competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area. These restraints on competition are unreasonable, because their anticompetitive effects are not outweighed by any procompetitive effects. Thus, respondents have violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition. Respondents' combination or conspiracy, or the effects thereof, are continuing and will continue in the absence of the relief herein requested. [7]

Commissioners Miller and Calvani voted in the negative.

Initial Decision by

Morton Needelman, Administrative Law Judge

November 21, 1985

I

Statement of the Case

The complaint in this proceeding was issued on August 6, 1984. It charges that in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the electrical subcontractors in the Memphis, Tennessee area have conspired or combined to restrain competition by means of a bid depository operated from 1956 until 1976 by the Memphis Chapter of the National Electrical Contractors Association ("Memphis Chapter"), and thereafter by the Electrical Bid Registration Service ("Registry"), which allegedly was organized by the Memphis Chapter for the purpose of continuing and refining the Memphis Chapter's earlier bid depository activities. According to the complaint, the Registry's rules relating to the bidding process between general contractors and electrical subcontractors has restrained price competition by:

> Holding electrical subcontractors to their submitted bids, which means that they cannot be changed by negotiation either before or after the Registry's deadline for submitting electrical bids;
>
> Requiring general contractors to agree that if they use the Registry on a particular job, they must use one of the registered bids;
>
> Preventing electrical subcontractors who use the Registry on any particular job from submitting bids for that job to general contractors who are not using the Registry. [2]

The complaint alleges that these rules are enforced by imposing fines

and other sanctions, mainly suspension from the Registry's bidding system. The actual or probable effect of the alleged restraints is said to be that prices for electrical subcontractor services are raised without any countervailing efficiency justifications. The complaint further charges that the operation of the Registry is conducive to bid rigging or other forms of agreements not to compete on the basis of price.

While the Registry's answer denies most of the substantive allegations of the complaint, it admits that the Registry (1) establishes a deadline for submitting electrical subcontracting bids, (2) requires general contractors who accept registered bids to agree that they will not award a subcontract to any firm that did not have a bid filed with the registry, (3) prohibits an electrical subcontractor using the registry from submitting bids to any general contractor not using the registry, and (4) limits the discretion of a general contractor in using nonparticipating electrical subcontractors. The answer filed by the Memphis Chapter puts into issue the same points raised by the Registry, and also denies the complaint allegations respecting the role of the Memphis Chapter in forming or controlling the Registry.

In the prehearing stage both sides were allowed discovery including depositions or interviews with all prospective witnesses. Proposed exhibits were exchanged, and prior to the formal hearings, the parties were given an opportunity to file objections to all exhibits that were to be offered without supporting testimony. Complaint counsel's case-in-chief was heard between June 4 and June 18, 1985. The defense case was presented during the week of July 15. Rebuttal testimony was offered by complaint counsel on August 14, and the record was closed for the receipt of evidence on August 23. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on September 23. Reply briefs were filed on October 7. [3]

After reviewing all the evidence, as well as the proposed findings and briefs submitted by the parties, and based on the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:[1] [4]

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[1] Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX – (Complaint counsel's exhibits)
RX – (Respondents' exhibits)

Joint Exhibit 1A-Z is the Tennessee Contractors Licensing Act. Testimony is cited by the name of the witness, followed by transcript page, as in Birrell 1196. Complaint counsel's Exhibit 1 and respondents' Exhibit 4 are the indices required by § 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

(footnote cont'd)

II

FINDINGS OF FACT

A. *Introduction: Construction Job Bidding*

1. Private firms and governmental units, commonly referred to in the construction industry as "awarding authorities", may use com-

Name	Called By	Tr. Pages
William K. Arnold (General Contractor)	Complaint counsel ("C.C.")	53–202
Frank Inman, Jr. (General Contractor)	C.C.	205–272
Cheryl Lynn Mann (Electrical Subcontractor)	C.C.	272–317
Roger James Peters (General Counsel of a General Contractor)	C.C.	327–415
Fred Talmoth Baker (Electrical Subcontractor)	C.C.	419–541
Robert E. Morrison (General Contractor)	C.C.	553–666
Cecil Raymond Boucher, Jr. (General Contractor)	C.C.	671–717
Joe Rayburn Hales (Senior Electrical Inspector, Shelby County)	C.C.	720–748
Irvin McGroom (General Contractor)	C.C.	759–805
Jesse M. Zellner (General Contractor)	C.C.	809–882
Roosevelt "Curley" Morgan (General Contractor)	C.C.	885–957
Russell H. Clark (Electrical Subcontractor)	C.C.	958–1048
Waylon R. Naylor (General Contractor)	C.C.	1051–1093
Frederick Ellsworth Wade (General Contractor)	C.C.	1100–1167
George S. Birrell (Associate Professor of Civil Engineering, Case Western Reserve University, Expert)	C.C.	1168–1300
John Frederick Stewart (Associate Professor of Economics, University of North Carolina, Expert)	C.C.	1307–1504, 2042–2099
Thomas Cooper Barnett (General Contractor and President of the Registry)	Respondents ("resp.")	1571–1622
David Bronson Martin (General Contractor)	resp.	1626–1702
Johnny Chester (Electrical Engineer, member of the board of directors of the Registry)	resp.	1703–1747
Gene Strong (Architect, member of the board of directors of the Registry)	resp.	1751–1845
Charles Dennis, Jr. (Electrical Subcontractor, Vice President and member of the board of directors of the Registry)	resp.	1845–1936
Earl Scurlock (Secretary-Manager of the Memphis Chapter and Manager of the Registry) [5]	resp.	1949–2028

petitive bidding to select a general or prime contractor for an institutional or industrial project. When competitive bidding is being used, the awarding authority requests that general contractors submit what is known as a "prime bid" for the overall project.[2] Since these general contractors normally do not perform specialty functions such as electrical work (installation of conduits, wiring, fixtures), they must obtain sub-bids from electrical and other subcontractors in order to prepare their prime bids.[3] At issue here are the efforts of the Memphis Chapter and the Registry to establish a bid depository designed to control the electrical sub-bidding process, especially the elimination of "bid peddling",[4] the practice whereby the general contractor discloses one electrical subcontractor's bid to another electrical subcontractor for the purpose of obtaining a lower bid.

B. *Identity of Respondents*

2. The National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), is a nonprofit corporation organized and existing under the laws of [6] Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.[5] The Memphis Chapter is engaged in various activities for the financial benefit of its 21 electrical subcontractor members, including counseling on price and profits, and the negotiation of a Memphis area labor contract.[6]

3. The Electrical Bid Registration Service of Memphis, Inc. ("Registry") is a nonprofit corporation organized and existing under the laws of Tennessee with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.[7] The Registry operates a bid depository designed to serve the economic well-being of Memphis area electrical contractors by eliminating bid peddling.[8]

4. The individuals named as respondents, C. H. Dennis, Jr., James L. Overton, Wayne A. Allen, and Jack Gross, are either officers or owners of electrical subcontracting firms. All currently serve on the board of directors of the Registry; in addition, respondent Dennis is

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[2] CX 2C, CX 3K, CX 4H; Birrell 1196.

[3] Wade 1119, Birrell 1196.

[4] During the course of the hearings, the witnesses generally drew no distinction between "bid peddling" and "bid shopping". *But see* Strong 1764 for a distinction based on whether the general contractor simply makes a survey of electrical prices (*i.e.*, "shops") or actually uses (*i.e.*, "peddles") the specific bid of one electrical subcontractor to drive down the price of another. For recognition by respondents of interchangeable use of the terms *see* CX 2D, CX 3K-L. Accordingly, throughout this initial decision I have used the terms interchangeably to refer to the negotiation for prices that are lower than those originally quoted in sub-bids submitted to a general contractor. A distinction is drawn, however, in several findings between pre-award and post-award bid peddling based on when the negotiations took place.

[5] Memphis Chapter Answer, ¶ (2).

[6] Memphis Chapter Answer, ¶ (2); Baker 500, Dennis 1895, Scurlock 1951–52.

[7] Registry Answer, ¶¶ (2–3).

[8] Barnett 1579–80, 1599; *see also* Finding 13.

vice president of the Registry.[9]

5. The record contains no evidence relating to the direct responsibility of the named individual respondents for the practices challenged in the complaint.[10] But as complaint counsel would have it, an inference of control by them over the Registry's practices should be drawn from the fact that these four individuals, who are all identified [7] with electrical subcontracting firms, currently make up a majority of the Registry's board of seven, and included in the board's general power to manage the Registry's affairs, is the right to appoint the Registry's manager and to fill vacancies on the board itself.[11] There is no evidence, however, that the named individuals have collaborated to use this latent power in order to dictate to the three nonelectrical board members.[12] On the contrary, all that the record will allow on control of the Registry is that Earl Scurlock, acting on behalf of the Memphis Chapter, picked the members of the first board,[13] that the first board picked the succeeding board and so on,[14] and that Scurlock would probably designate their successors if the four named respondents were removed.[15] And while the board also has the power to approve sanctions for violations of the Registry rules—this is the function of the board that is most relevant to this proceeding, *see* Findings 25, 45–54—the record shows that all disciplinary actions were imposed by a unanimous vote of all board members present, as required by Registry rules.[16] As for the day-to-day business of the Registry—running a bid depository for electrical subcontracting jobs —this is carried out exclusively by Scurlock and his assistant (Juanita McClain), and there is no evidence that the named individual respondents in any way participate in this activity.[17] [8]

C. *Commerce*

6. The Memphis Chapter and the Registry are engaged in "commerce," as "commerce" is defined in the Federal Trade Commission

[9] Registry Answer, ¶ (4); Memphis Chapter Answer, ¶ (4); CX 2"O"-T, CX 3D, K; Dennis 1849–50.

[10] While Dennis was named in the complaint in his capacity as a director and an officer, there was no evidence introduced respecting his duties as vice president except that he presides at board meetings when Barnett, the president of the Registry, is absent. Barnett, who also serves on the board of the Registry, was not named as an individual respondent in any capacity.

[11] *See* CX 3C, K, CX 4A-D.

[12] *See* Strong 1756, Dennis 1867. Since its formation, the Registry board has consisted of four electrical subcontractors, an architect, an electrical engineer, and a general contractor. The president of the Registry has always been Cooper Barnett, a general contractor. Registry Answer, ¶ (3); Barnett 1573.

[13] CX 2F; Barnett 1572, Strong 1755, Scurlock 1953–54, 1999, 2009.

[14] CX 4B.

[15] *See* Scurlock 1952–54.

[16] Registry Answer, ¶ (12)(b)(i); CX 3F, M, CX 4S. No Registry business, including the imposition of sanctions, can be transacted without a quorum of five directors. This means that a sanction cannot be approved without the vote of at least one nonelectrical board member. CX 4S; Barnett 1575, 1589, Dennis 1867.

[17] *See* Findings 12, 14–15; *see also* Chester 1733, Scurlock 1955, 2000.

Act as amended.[18]

D. *The Role Of The Memphis Chapter In The Evolution Of The Memphis Area Electrical Bid Depositories*

7. The Memphis Chapter operated a bid depository from January 1956 until August 1976.[19] While the bid depository operated by the Memphis Chapter was intended to bind all members of the chapter to rules eliminating bid peddling,[20] these rules were not rigorously enforced, and this earlier depository was widely regarded as ineffectual.[21]

8. In 1976, the board of the Memphis Chapter directed their manager, Earl Scurlock, to explore the feasibility of organizing a bid depository modeled after The Bid Registration Service of Memphis, Inc., a depository operated by the mechanical subcontractors in the Memphis area which had effectively eliminated bid peddling in the mechanical sub-trade.[22] Scurlock contacted B.V. Stevens, manager of the mechanical [9] subcontractors' bid depository, and Carl Langschmidt, counsel for respondent Registry herein, and in 1976 counsel for the mechanical subcontractors' bid depository. Stevens and Langschmidt advised Scurlock about the technical and legal requirements for setting up a bid depository patterned on the mechanical subcontractors' model.[23]

9. Stevens' and Langschmidt's advice was reported back to the Memphis Chapter by Scurlock, who was then authorized by Memphis Chapter to inform Langschmidt to draw up the necessary legal documents incorporating the Registry on September 7, 1976.[24]

10. In October 1976, the board of directors of the Memphis Chapter approved a $2,000 loan to the Registry, which was intended to enable the Registry to begin its operations.[25] This unsecured loan was paid

[18] CX 2C, CX 3B, J, CX 4J. The Registry operates in the following 23 Memphis area counties in Tennessee, and neighboring Mississippi and Arkansas: Shelby, Fayette, Lauderdale, and Tipton Counties, Tennessee; DeSoto, Marshall, Benton, Tunica, Tate, Coachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Grenada Counties, Mississippi; and in Crittenden, Phillips, St. Francis, Lee, Cross, and the southern half of Mississippi County, Arkansas. CX 3B, J, CX 4A. The geographic jurisdiction of the Memphis Chapter is essentially the same as the area served by the Registry. CX 2"T".

[19] Memphis Chapter Answer, ¶¶ (11)(a-b); CX 2A, CX 6B.

[20] Scurlock 2012.

[21] Dennis 1905–08. Essentially, the rules of the Memphis Chapter's bid depository provided that sealed bids had to be submitted by electrical subcontractors to designated branches of a commercial bank on all jobs valued in excess of $3,000. These sealed bids, which had to be submitted four hours prior to the deadline for the general contractors, could not be changed. The Memphis Chapter bid depository obtained no agreements from general contractors to use the bids submitted through the depository and, in practice, there were many instances when electrical contractors orally changed bids after the deadline. CX 2A-C, CX 15A—CX 17B; Dennis 1908–10, Scurlock 1995–97, 2011–12.

[22] CX 2E-F, CX 6B; Dennis 1907–08, Scurlock 1952–54, 2010.

[23] CX 2E-F, CX 6B; Scurlock 1952–54.

[24] CX 2F,'CX 6B, CX 7A-D; Scurlock 1952–54.

[25] CX 2F, CX 6B, CX 8D-H; Scurlock 2014.

back within a few months,[26] and since 1976, the Registry has received no other loans from the Memphis Chapter.[27]

11. Of the seven members of the first board of directors of the Registry picked by Scurlock, four were officers or owners of electrical subcontracting firms that were members of the Memphis Chapter.[28] Subsequent Registry boards during the period 1977–1983 included four representatives of electrical firms that were members of the Memphis Chapter.[29] In 1984, three of the directors of the Registry were similarly affiliated with members of the Memphis Chapter,[30] and in 1985, of the seven Registry [10] board members, two—C.H. Dennis and James Overton—were connected with firms belonging to the Memphis Chapter.[31] Since the Registry's inception, at least one officer or director of the Memphis Chapter has been on the Registry's board.[32]

12. Scurlock, the manager of the Memphis Chapter, is also the only manager the Registry has ever had.[33] Scurlock, who is paid a salary and bonuses by the Memphis Chapter but receives no separate compensation as manager of the Registry,[34] is responsible for the day-to-day operations of both the Memphis Chapter and the Registry.[35] Since its inception (and to this day) the Registry operates out of the office of the Memphis Chapter.[36]

E. *The Operation Of The Bid Depository By The Registry*

13. Since its creation in 1976 by the Memphis Chapter, the Registry has established and enforced rules designed to eliminate bid peddling in the Memphis area electrical trade.[37]

14. Scurlock and his assistant, Juanita McClain, gather information from trade publications ("Builders Exchange Weekly Bulletin" and "Associated General Contractors [11] Weekly Bulletin"), news sources, as well as from subcontractors and general contractors, about

[26] CX 2F, CX 8D-H, CX 9—CX 10; Scurlock 2014.

[27] CX 8E.

[28] Vernon G. Goldecke, one of the members of the Registry's first board, was a director of the Memphis Chapter in 1976. Others who served on the first Registry board and who were also members of the Memphis Chapter were Jack Gross, David Haines, and Frank Pitt. CX 2F-G, K, CX 3R.

[29] CX 2"O"-T, CX 3R-W.

[30] CX 2S, CX 3V.

[31] Dennis, vice president of the Registry and a current member of the Memphis Chapter, was president of Memphis Chapter in 1976 when the Registry was organized. Dennis was also governor of Memphis Chapter in 1978–1979, 1982–1985. Dennis' firm, Byrd Electric, has been a member of the Memphis Chapter from 1967 to the present. CX 2G-H, P-T, CX 3D, K, CX 11A-S; Dennis 1848. Overton is a current member of the Memphis Chapter. CX 2H.

[32] CX 2"T".

[33] CX 2G.

[34] Scurlock 2009.

[35] Chester 1733, Strong 1796, Scurlock 1955.

[36] CX 2G. The Registry pays the Memphis Chapter a negotiated monthly fee for use of office space and secretarial services. CX 2G, CX 26C; Barnett 1591–92, Scurlock 2001–02.

[37] CX 3L-N, CX 160B-C; Arnold 122, Mann 287, Baker 498, Boucher 679, Barnett 1579–80, 1599, 1603–04, Chester 1712.

projects that might trigger the use of the Registry.[38]

15. Having made a determination that a particular job is one on which there is to be competitive bidding and that the electrical work is likely to exceed $5,000 in value,[39] Scurlock and McClain poll all the general contractors who might conceivably be interested in bidding on the job to determine whether they are willing to accept bids through the Registry.[40] Scurlock and McClain attempt to poll the general contractors several days in advance of the generals' bidding deadline; in actual practice, however, most of the generals are contacted on the day before the generals' deadline.[41] Scurlock or McClain enter on a Registry work sheet the name of every general contacted, the general's telephone number, the name of the job, the bid date, the bid time, the name of the general's architect, the name of the general's engineer, and a notation as to whether the general has indicated a willingness to accept Registry bids.[42]

16. The Registry requires general contractors, who have indicated a willingness to accept Registry bids, to agree that they will award the electrical subcontract to a firm that has a bid registered with the Registry and at the price filed with the Registry. [12] The winning general, however, need not select the low Registry bidder so long as it confines its selection to an electrical firm bidding through the Registry.[43]

17. Since the Registry has no membership rolls, any licensed electrical subcontractor may submit a bid to a general who has previously indicated its willingness to accept Registry bids. The electrical subcontractors in the Memphis area apparently learn the identity of generals willing to accept Registry bids from either Scurlock or McClain who encourage electricals to bid through the Registry.[44]

18. An electrical subcontractor using the Registry on any particular job may not submit bids for that job to a general contractor not using

[38] Scurlock 1956–57.

[39] CX 3B, J; Scurlock 1981–82. The $5,000 limit is not an important restriction on the operation of the Registry since significant electrical jobs are valued in the area of $50,000. *See, e.g.*, Zellner 824–26, Morgan 926. In addition to the monetary limitation, the Registry does not operate when subcontractors bid directly to awarding authorities for projects on which the bids are sealed and opened publicly. CX 4J.

[40] Inman 225, Zellner 826, Martin 1634–35, Scurlock 1956–57.

[41] Arnold 99, Boucher 688–89, McGroom 766, Barnett 1578.

[42] Scurlock 1956–59.

[43] The Registry's bid forms give the following notice to general contractors who have indicated a willingness to accept Registry bids: "He [General Contractor] agrees not to award the contract for the work covered by these bids on the said project to any party other than a subcontractor who has duly and timely deposited and registered his bid with the Electrical Bid Registration Service and at the price so bid by the subcontractor, it being acknowledged that as prime contractor he had the right to register with the Registry any outside subcontractor bids which he received that were not registered with the Registry and thereby be free to award the contract for such work to any such subcontractor submitting an outside bid." CX 4P. *See also* CX 3G, N; Zellner 838. In recent years the Registry has made an intensive effort to inform Memphis area general contractors about the Registry's rules, and to receive from these contractors an acknowledgement that they would abide by the rules when using the Registry. CX 3H, N, CX 12B-Z19. *See also* Dennis 1878–79.

[44] Barnett 1618–19, Scurlock 1987–88.

the Registry.[45]

19. The Registry imposes on electrical subcontractors a strict deadline for submitting sub-bids. The deadline is three hours prior to the deadline for the general [13] contractors.[46] In the Memphis area, prime bids of general contractors are usually due at 2:00 p.m.,[47] which means that the Registry has an effective deadline of 11:00 a.m.

20. Bids of electrical subcontractors may be amended or withdrawn before the Registry's deadline by the subcontractors' compliance with the same procedures as would have applied had the amended or withdrawn bids been original bids.[48] [14]

21. After the Registry's bid submission deadline has tolled, those using the Registry cannot negotiate over price. The Registry requires that all awards made by general contractors must be at the price contained in the registered subcontractor bids. This prohibition against negotiation over price applies both before and after the award of the prime contract.[49]

22. The Registry bids of electrical subcontractors must be submitted to the Registry on special forms provided by the Registry. The electrical subcontractor fills out a separate form for each general to whom

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[45] Registry Answer, ¶ (12)(a)(iii). *See also* CX 3G, N. The Registry's rules provide:

> When a subcontractor registers a bid or bids with the Registry, he shall not submit any non-registered bids to any prime contractor, or to the awarding authority in the case of direct bidding. CX 4M.

[46] The Registry's rules provide:

> The deadline for delivery of the copies of bids to the depository for registration (said deadline being herein referred to as the "deadline for registration of bids" for ease of reference) shall be three hours prior to the deadline established for delivery of bids by prime contractors to the awarding authority. If the subcontractor bids are submitted directly to the awarding authority, the deadline for subcontractor bid registration shall be the same deadline as established for delivery of bids to the awarding authority.
>
> When no deadline has been established for the delivery of the prime contractor bids to the awarding authority, or for the delivery of subcontractor bids to the awarding authority in the case of direct bidding, the Registry shall establish a deadline for the registration of subcontractors' bids and for the delivery of bids to the prime contractors or the awarding authority, as the case may be, after consultation with the prime contractors and/or awarding authority. CX 4M-N. *See also* Registry Answer, ¶ (12)(a)(i).

[47] Arnold 134–35.

[48] The Registry's rules provides:

> Any bid registered with the Registry may be amended or withdrawn *before the deadline for registering of bids* by complying with the same procedure as if the amendment or withdrawal were an original bid: e.g., (1) the original amendment or withdrawal signed by an authorized representative of the subcontractor and the duplicate copy being placed in the appropriate sealed envelopes for each prime contractor, or the awarding authority if bid directly, (2) the envelopes containing same bearing on their face the specified information, except being captioned "AMENDMENT OF ORIGINAL BID" or "WITHDRAWAL OF ORIGINAL BID" and "COPY OF AMENDMENT OF BID FOR REGISTRATION" or "COPY OF WITHDRAWAL OF BID FOR REGISTRATION", respectively, (3) the envelopes being delivered by subcontractor (a) to the depository, time stamped and deposited in the locked container for original bids to be delivered and the locked container for copies of the bids to be registered, and (b) in the case of direct bidding, to the awarding authority. Upon opening the container of original bids, the amendment or withdrawal shall be placed with the original bid to the prime contractor in the large envelope and delivered to the addressee as provided for original bids. Upon opening the container of copies of bids for registration, the information as to amendment or withdrawal of a bid to the successful prime contractor, or the awarding authority in the case of direct bidding, will be tabulated with the information about the original bid as provided above.
>
> This provision is not intended to foreclose, waive or otherwise limit any right a subcontractor may have to withdraw a bid after the deadline for deposit and registration of bids on the ground of mistake, what rights a subcontractor may have being determined by the applicable law of the jurisdiction. CX 4R-S.

[49] Registry Answer, ¶¶ (12)(a)(i-ii); Barnett 1586–87.

it wishes to bid. The electricals may elect to bid different prices to different generals. The bid form for each general must be placed in a sealed envelope for transmission to the Registry.[50]

23. When the sealed envelopes containing the electrical bids arrive at the Registry office, they are placed in large envelopes designated for each general who has [**15**] agreed to accept Registry bids. The large envelopes are delivered to these generals near 12 noon, approximately two hours before the generals' own deadline.[51]

24. While a general contractor is permitted under the Registry rules to register late bids it has received from electrical subcontractors who have not filed sealed envelopes directly with the Registry, time constraints faced by general contractors in receiving and compiling bids on bid day make it impractical to do so, since any bid, by the terms of the Registry's rules, can only be considered if physically filed with the Registry prior to the Registry's deadline.[52] Should a general contractor use its office staff to register these late bids (and the record shows that most general contractors do not consider this a viable way to expand on the number of firms bidding through the Registry), it would have the effect of diverting the general's personnel at the crucial [**16**] point in time near the general's own bidding deadline when they could be negotiating over the terms of bids with trades that do not have bid depositories.[53]

25. The Registry's rules are enforced by sanctions, mainly suspension from use of the Registry.[54] Suspension necessarily means that on future jobs, the general contractor will not have available Registry bids with the result that it will have fewer competitive prices to work with in making up its prime bid.[55] As for the electrical subs, suspension is detrimental to their businesses since it means that they cannot

[50] CX 4L-Q; Mann 285–86, Scurlock 1965–67.

[51] Scurlock 1965–68. After the identity of the winning general has been determined, the Registry lists the bids to that general, and this tabulation is sent to all electricals who had bid on the job. Scurlock 1968–69.

[52] The Registry's rules provide:

> *By Prime Contractor or Awarding Authority (Outside Bids):* Each prime contractor, and the awarding authority in the case of direct bidding, shall have the right to register any outside bids he receives which have not been registered with the Registry by timely delivery of exact copies of all outside bids he desires to register, placed in a single, sealed envelope, furnished by the Registry, to an appropriate representative of the depository with the same information appearing on the face of the envelope as provided above for use by subcontractors in registering their own bids.
>
> Upon receipt of the sealed envelope containing the copies of outside bids from the prime contractor, or awarding authority, the representative of the depository (not the prime contractor or awarding authority) shall time stamp and deposit the envelope in the locked container designated for the deposit of the copies of subcontractors' bids for registration.
>
> The deadline for registration of outside bids by a prime contractor or awarding authority shall be the same as that provided below for registration by subcontractors of their bids. CX 4M. *See also* text of bid form, Note 43.

[53] Arnold 96, 101–02, 110, 170–71, Inman 218–19, Boucher 685–90, Zellner 816–17, Morgan 923, Naylor 1072–73, Birrell 1264–65, Stewart 1336–37, Barnett 1600–01, Martin 1679–80. *See also* Finding 36.

[54] Registry Answer, ¶ (12)(b)(i); CX 3F-H, M-N, CX 4S; Strong 1768–69. *See* Findings 45–54.

[55] Arnold 92–93, Peters 343–47, 358–64, Zellner 819–20, Martin 1675–76.

effectively bid to generals using the Registry.[56]

26. Compliance with Registry rules is also secured by the Registry's policy of notifying all general contractors and electrical subcontractors who regularly use the Registry of the identity of suspended firms.[57] The Registry's notification policy, which ostensibly has the purpose of simply informing contractors and subs of the names of firms that will not be bidding through the Registry,[58] tends to make adherence to Registry rules more certain since suspension may harm the reputation of a firm and make it more difficult for it to get jobs in the future.[59]

27. The Registry operates on the basis of a fee paid by the electrical subcontractor who has bid successfully on a particular job. The Registry's charge is 1–½ percent of the contract price, but in no event less than $25 or more than $2,000.[60] [17]

F. *The Market Setting Of The Bid Depository Operated By The Registry*

28. In recent years there has been a drop in both the number and dollar value of jobs bid through the Registry. While complaint counsel do not dispute the fact that such a decline has occurred, it claims that precise market figures are simply unavailable, and it is sharply critical of respondents' attempt to fill in this lacuna by applying to total nonresidential construction figures (as provided by the authoritative F.W. Dodge survey) a factor of 10 percent, which is widely accepted as representing the portion of total construction fairly attributed to electrical work.[61] Even if respondents' evidence is somewhat flawed,[62] it is at least useful for showing that the general trend has been in the direction of the Registry handling an increasingly diminished percentage of total Memphis area electrical subcontracting jobs, as shown in Table 1, below:

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[56] CX 92; Baker 425–26.

[57] Registry Answer, ¶ (12)(b)(ii); CX 3H, N, CX 8K-L.

[58] CX 8K-L, CX 158F-"T".

[59] Boucher 691–92.

[60] CX 4S-T.

[61] Morgan 926.

[62] Respondents' evidence is questioned because (a) it includes jobs under $5,000 that are not eligible for Registry consideration, and (b) it includes negotiated work that has been entirely removed from the competitive bidding process. *See* Stewart 1405–20, 1432–33.

Table 1

Registry Jobs As A Percentage Of Total Memphis Area Electrical Subcontracting Jobs

Year	(1) Number of Electrical Jobs in the Memphis Area	(2) Number of Electrical Jobs Processed Through Registry	(3) Column 2 as % of Column 1	(4) Dollar Value of Electrical Jobs in the Memphis Area	(5) Dollar Value of Electrical Jobs Awarded Through Registry	(6) Column 5 as % of Column 4
1984	514	28	5.44	$33,460,000	$3,588,000	10.72
1983	559	48	8.58	24,460,000	4,245,000	17.35
1982	401	45	11.22	20,880,000	4,687,000	22.44
1981	489	69	14.11	20,510,000	6,132,345	29.89
1980	432	56	12.96	22,550,000	9,255,619	41.04
1979	452	76	16.81	30,045,800	7,506,749	24.98
1978	384	155	40.36	11,740,800	8,412,000	71.64
1977	472	123	26.05	13,590,200	6,878,000	50.60
1976	430	18	0.04	12,637,100	2,916,127	23.07

Sources: CX 14A-"T"; CX 154; RX 1.

29. The record suggests several reasons for the decline shown in Table 1. There has been a marked trend in recent years away from bid work, and toward the use of prices negotiated between owner and an individual general contractor or owner and a [18] preselected group of general contractors.[63] Moreover, even on jobs on which there is competitive bidding for the prime contract, the winning general may bypass subcontractor bidding because it is accustomed to working with a previously selected team of specialty tradesmen.[64] It should also be noted that ordinarily the Registry will not be used unless the particular job is well-defined, complete, and assured of adequate financing.[65] Finally, the Registry does not operate at all if the general has been preselected even if the electrical work is open to competitive bidding.[66]

30. Notwithstanding the decline in the total number of jobs going through the Registry, the Registry nevertheless affects an important segment of electrical subcontracting work done in the Memphis area. On most significant electrical jobs in which bidding is involved, the Registry operates.[67] Moreover, the volume of electrical subcontracting that passes through the Registry is cyclical, to the point that Scurlock testified that the machinery of the Registry must be preserved in anticipation of a shift from negotiated to bid work.[68]

31. The claim was made by several witnesses that the Registry is simply an option open to general contractors who elect to use a sealed bid system.[69] The weight of the evidence is to the contrary. For while it is true that general contractors are [19] theoretically free to choose to go through the Registry or to bypass it,[70] as a practical matter when the Registry is in operation, contractors are under pressure to use it since they want all the bids that they can possibly get, including the bids that can only be had by going through the Registry. It is the perception of generals that without such a full array of electrical bids they cannot prepare truly competitive prime bids.[71] Moreover, general contractors are especially interested in obtaining the bids of the dependable and financially stable electrical firms which regularly use the Registry, and generals believe that they would be at a competitive disadvantage if other generals had access to these well-established firms (by agreeing to take Registry bids) while they remained outside

[63] Arnold 58–59, Inman 208–09, Scurlock 1976–81.
[64] Strong 1829–32, Dennis 1852.
[65] Strong 1829–30, Dennis 1852; *see also* Martin 1674–75.
[66] Dennis 1899–1900.
[67] Baker 482, Zellner 826, Barnett 1620, Martin 1700–01.
[68] Scurlock 2003–04.
[69] Strong 1759–60, Scurlock 1959–60.
[70] Morgan 937, Naylor 1092, Wade 1144–45, Martin 1633–34.
[71] Inman 213, Boucher 678, Zellner 832, 843, Naylor 1067–68, Wade 1139, Martin 1673–75.

of the Registry.[72] It should also be noted that the Registry rule prohibiting subcontractors from bidding both inside and outside of the Registry is specifically designed to force generals to use the Registry.[73]

32. There is no credible evidence that the use of the Registry on any job was instigated by general contractors.[74] To the contrary, notwithstanding the pressure to use it in order to obtain a complete array of bids, the record shows that general contractors perceive of no other significant advantage to them from the use of the Registry; indeed, they would prefer not to use it, and would rather rely on the last [20] minute give-and-take over the telephone that prevails in their dealings with other sub-trades.[75]

33. According to complaint counsel, the market significance of the Registry is somehow enhanced by entry conditions in the Memphis area. While there is some evidence in the record that licensing,[76] bonding,[77] and other requirements[78] may operate to restrict the number of electrical subcontractors, there was no testimony that the existing electrical firms constitute an inordinately small pool of competitors, or that Memphis area general contractors are typically confronted with a meager selection of electrical subcontractors from whom to pick.[79] All that the record will allow on this [21] point is that the general contractors prefer to obtain the bids of all firms interested

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[72] CX 161E-F; Arnold 65, 73, 92–93, 112–14, 118, Inman 213, 224, 226–27, Zellner 832–34, 843, Morgan 924, 926–28, 945, Wade 1144, Barnett 1601, Martin 1670, 1675. Members of this class of subcontractors, which includes the membership of the Memphis Chapter, may not bid through the Registry on a particular job for one or more of the following reasons: general distaste for federal jobs because of record-keeping requirements, the size of the job, the kind of work involved, or commitment to other work. Zellner 830–31, Morgan 951–52, Clark 966, Martin 1639–40, Dennis 1895–96.

[73] CX 160F-G; Dennis 1930–33.

[74] *See* Inman 225, Peters 393, Boucher 695.

[75] Arnold 64–65, 120–22, Inman 224, Peters 363, Morrison 598, Boucher 695, Zellner 818, Morgan 923–24, Naylor 1065–67, Wade 1138–39.

[76] Under Tennessee law, all electrical work in excess of $50,000 must be done by firms holding a state license. A key requirement for obtaining a state license is that the firm employ at least one master electrician. Only persons who have graduated with a degree in electrical engineering from a recognized university and who have two years of industry experience or, alternatively, persons with four years experience as journeyman electricians are eligible for the master electrician examination. The master electrician examination, which may be taken only once every six months, is administered by county or municipal authorities. In recent years, the administration of the licensing examination in Shelby County has operated to exclude persons who have been qualified as master electricians in other municipalities and counties in Tennessee and elsewhere. Approximately 25 applicants were examined by the Shelby County Electrical Licensing Board in February 1985. None of those persons passed the examination. The passing rate for prior examinations during the last several years has averaged less than 33 percent. Joint Exhibit 1A-Z; CX 116A-Z137, CX 117, CX 118; Mann 283–84, Hales 742, Dennis 1883. Note, however, that at least one experienced electrician took the exam although he acknowledged that he was not familiar with the code, and would have to "bluff" his way through. RX 3.

[77] Memphis and Shelby County law requires that all subcontractors be bonded and insured. Some firms are qualified and bonded to perform work on smaller jobs only, and therefore may not work on larger projects. CX 116A-Z137.

[78] There is some evidence that Memphis (or for that matter any other metropolitan area) is somewhat insulated from outside competition. Electrical subcontractors from outside of the Memphis area would have to assume transportation and subsistence costs that may make it difficult for them to compete against Memphis electrical subcontractors. *See* Clark 981, Wade 1110. Outside subcontractors also face the risk of having to deal with contractors whose ability is not known. Clark 981–85. In addition, local firms may have the advantage of established relationships with local labor unions and material suppliers. CX 161C-D; Wade 1117–18. Notwithstanding these difficulties, attractive Memphis area jobs attract outside subcontractors. *See* Clark 981.

[79] *See, e.g.*, Morgan 953–54, Wade 1119.

in a project, including bids of electrical firms who use the Registry as well as those who are bidding outside of the Registry.[80]

G. *The Effects Of The Registry*

34. The effects of the Registry were analyzed in depth by two academic experts called as witnesses by complaint counsel—George S. Birrell, a civil engineer,[81] and John F. Stewart, an economist.[82] The qualifications of these experts were not challenged by respondents, and no significant aspect of their testimony was disturbed by cross-examination. Moreover, their testimony was not only fully consistent with and supported by the testimony of respondents' own witnesses who testified that the Registry eliminates price cutting pressures, but it was also supported by the exhibits introduced into the record respecting the sanction incidents. *See* Findings 43–55. Accordingly, the contrast between the economic significance of bidding through the Registry and bidding without a bid registry that follows (Findings 35–42), draws heavily on this highly credible expert testimony.

35. By its terms, the Registry segments the bidding process by forcing general contractors to choose between taking bids from firms bidding inside or outside of the Registry, but not both.[83] If the Registry did not exist, a general contractor would be free to obtain sub-bids from any subcontractor who might be interested in bidding on a [22] particular job.[84] This segmentation of electrical subcontractors between those bidding inside and outside of the Registry, which is designed to prevent the bids received through the Registry from being undercut by outside bids,[85] is perceived by general contractors as depriving them of access to part of the universe of bidders that they need in order to make up a competitive prime bid.[86] The perception of these general contractors is fully consistent with the expert testimony, grounded on bidding theory, to the effect that because segmentation of a market reduces the total number of bids received by a general, it tends to increase prices.[87]

36. In addition to segmenting the market, the Registry imposes an artificial time limit on price negotiation. When the Registry is not in

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[80] Equally unimpressive is respondents' claim that the Registry facilitates entry of new firms by protecting them from the price-cutting pressures of bid peddling. *See, e.g.*, Dennis 1883–85. Protecting a new entrant from price competition is not a cognizable economic justification. Stewart 2072–73.

[81] Birrell, an associate professor at Case Western University, is an expert in the management of construction projects including the contracting process, the formation of the construction team consisting of generals and subs, estimating costs, bidding, and planning construction work. CX 128A-S; Birrell 1168–90.

[82] Stewart, an associate professor at the University of North Carolina, specializes in industrial organization. CX 129A-E; Stewart 1307–14.

[83] Findings 16, 18; CX 133, CX 155T-X; Stewart 1333–39.

[84] Naylor 1061–62.

[85] Strong 1806.

[86] Arnold 95–101, 123–27, 196–97, Inmann 227, 233, 241–44, Boucher 688, Zellner 832, 836–38, Morgan 923, 941–42, Wade 1139.

[87] CX 131B, CX 155T, V-X; Birrell 1271–75, Stewart 1327–39.

use, or where a particular trade has no bid depository to turn to, the bidding process is subject to increasingly vigorous price pressures as telephone negotiations intensify near the general contractors' prime bid deadline.[88] Such last-minute telephone negotiations may be initiated either by general contractors or by subcontractors. During the course of these telephone negotiations, generals or subcontractors may employ various bidding strategies and pressures.[89] To begin with, a general may simply shop by informing a subcontractor that its bid is too high without specifying the exact bid of any other subcontractor.[90] Another strategy that may be employed is outright bid peddling, whereby the general [**23**] uses the specific bid of one subcontractor to drive down the bid of another.[91] Still another ploy, is for a subcontractor to volunteer a last-minute telephone change, perhaps citing a sudden concession from a supplier or the savings that arise when the subcontractor finds an acceptable alternative material under the specification provision allowing for the substitution of "or equals".[92] Irrespective of the exact bidding strategy used, and who has initiated the last-minute telephone contact, the record evidence is that pre-award price concessions are almost universally incorporated into the general contractor's prime bid with the result that the awarding party receives a lower price.[93]

37. The pre-award bargaining in the absence of a bid depository (again, usually in the form of last-minute telephone conversations) may touch on price indirectly as general contractors and electrical subcontractors negotiate over such matters as "or equals", work scope, and possible redundancies or overlaps.[94] *See* Findings 38–40.

38. Commonly used in the construction industry is the concept of "or equals", that is, the substitution of material called for by a specification with a material of equal quality.[95] It has been the experience of firms in the construction industry that some of the best price reductions for these "equals" come just before the generals' deadline as suppliers maneuver in an effort to have their customers—the subcontractors—submit winning sub-bids.[96] By cutting off the electrical subcontractors' bidding three hours before the generals' deadline, the Registry tends to inhibit the use of such late price [**24**] concessions from suppliers to electricals, which might, in turn, lower the prime

[88] Morrison 568–69, 593–96, 603, Boucher 676–77, Zellner 844–45, Naylor 1065–67, Wade 1113–15, 1122–26, 1138, Birrell 1211–14.

[89] *See* CX Physical Exhibit A.

[90] Arnold 183–84, Peters 365–67, Zellner 849, Wade 1127–29.

[91] *See* Mann 287, Boucher 679.

[92] Baker 490–91, Zellner 840, Wade 1135–37, Birrell 1238–40. *See also* Finding 38.

[93] CX 155P; Arnold 91–92, 194, Morrison 575, 593–94, Boucher 681, McGroom 784–85, Zellner 834–35, Birrell 1213–14, 1259–60, Dennis 1919.

[94] Birrell 1206–13.

[95] Birrell 1238–39.

[96] Morrison 604–06, Zellner 854, Wade 1122–23.

bids of the generals.[97]

39. Work scope is the subcontractor's perception, derived from an examination of drawings and specifications, of the service to be provided on a project. On the basis of this examination, the subcontractor typically makes a "quantity take-off" of work units to be provided, and then based on his projection of costs and targeted margin, a bid price is worked up. Different subcontractors, however, have different perceptions of work scope on any given job, and one subcontractor may have included what another has omitted.[98] When such differences become apparent to the general contractor after a bid is filed, the usual procedure (in the absence of a bid depository) is for the general and subcontractors to engage in telephone negotiations clarifying and, if necessary, adjusting price to reflect any new understanding about work scope.[99] The Registry's rules do not allow for such post-filing price negotiation over work scope.[100]

40. Still another area affected by Registry rules is negotiation over redundancies. Should the general contractor discover a redundancy or overlap, say, control wiring that may be done by mechanicals or electricals, or scaffolding which may be done by the general itself or by one of the sub-trademen, the procedure followed in the absence of a bid depository is for the general to contact the subsidiary trades bidding on the job, inquire about the possible redundancy, and negotiate a price adjustment.[101] **[25]** While Registry rules do not prohibit the first step in this procedure—the inquiry about a possible redundancy[102]—there is an absolute prohibition against the post-filing negotiation of a price concession, the most direct way of eliminating the redundancy.[103] Under the Registry rules all that a general confronted with a redundancy problem may do is wait until after the generals' bidding deadline has passed, and assuming it has been awarded the prime contract, it could then negotiate a "change order".[104] A post-award change order, however, is an option that is only available to the winning general; moreover, the post-bidding negotiation of change orders may slow down the construction process, cause the renegotia-

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[97] Wade 1122–23. *See also* Wade 1163–64.

[98] Birrell 1206–08.

[99] Wade 1113–15, Birrell 1212–13, 1218–19.

[100] Zellner 844–45, Birrell 1227–28.

[101] CX Physical Exhibit A; Arnold 121–23, 153, 172–74, Inman 214–15, 253–60, Zellner 854–55, Naylor 1066–69, Birrell 1209–13. As Birrell put it,

> I perceive that relationship [between discussions and price changes] as intimate; that the purpose of the discussion is to establish if changes need to be made in price to enable the minimization of overlaps and omissions across competing bidders in one trade and across the bidders in all trades. For these people to discuss something about the project without it being related to the price of the project, you would have to think maybe pretty hard to find some topic to discuss, if it didn't have a relationship to price. Birrell 1232. *See also* Wade 1123–26.

[102] Barnett 1585.

[103] Arnold 122, 162–65, 173, Inman 257, 267–68, Birrell 1227–28, Dennis 1910.

[104] Arnold 167–68, Inman 269–70, Chester 1721–22.

tion of related subcontracts, and are generally regarded as tending to increase costs.[105]

41. If the Registry did not exist, even after a general contractor has been awarded the prime contract, the successful general and all interested subcontractors could engage in further negotiations. Thus in trades which do not have a registry, or when the Registry is not operating on an electrical job in the Memphis area, the winning general is likely to be courted in the post-award period by subcontractors who are now [**26**] prepared to lower their pre-award bid in recognition of the added leverage enjoyed by the successful general contractor.[106] In addition, there may be post-award negotiations about work scopes and the substitution of materials ("or equals") that could change the subcontractor's bid.[107] While lower subcontracting bids received in the post-award period may be passed on to the awarding authority, there is little incentive to do so, and most post-award reductions in price only result in improved margins for general contractors.[108]

42. Complaint counsel's experts concluded that the Registry's rules limiting price negotiation and segmenting the market, as described in Findings 35–41, are likely to raise the cost of electrical subcontracting services.[109]

43. Respondents argue that the Registry has no impact on price because subcontractors submit their lowest possible price to the Registry, confident that their sealed bids will not be subject to peddling.[110] As a corollary of this "best price" argument, the claim is made that in the absence of the Registry, subcontractors may anticipate bid peddling by inflating their bids in order to leave room for negotiation. The notion of "best price" as one determined subjectively by businessmen was sharply criticized by complaint counsel's experts. Professors Stewart and Birrell testified that [**27**] all businessmen view their offers as the "best price". The function of the market is to test whether this so-called "best price" can be lowered still further.[111] Moreover, if in fact the Registry was the source of the "best price", or if in the absence of a bid depository experience showed that margins are inflated in anticipation of bid peddling, one would expect to see generals replicating the Registry in bid depositories for other trades. No such

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[105] Arnold 169–70, Inman 253–61, 266–68, 272, Birrell 1235–38.

[106] Wade 1126–27, Birrell 1204, 1258–59. Post-award peddling may take place over an extensive period of time since some sub-trades are not required to be on the job site until other work is completed. Birrell 1259.

[107] Naylor 1073–74, Birrell 1257.

[108] Inman 248, Morrison 594, McGroom 784. A benefit does accrue to the owner, of course, if the general's bid had included an allowance for expected savings resulting from post-award bid peddling. CX 155P-Q; Wade 1156, Birrell 1240.

[109] CX 131A—CX 134, CX 155P-Q, S-X; Birrell 1213–14, 1261–63, 1271–74, 1291–93, Stewart 1319–21, 1333–47.

[110] The "best price" argument was supported by several witnesses called by respondents (Barnett 1574, Martin 1630–31, Chester 1712, Dennis 1850–51, Scurlock 2004–06) as well as by the testimony of witnesses called by complaint counsel who said that the Registry was a source of good or low prices. *See, e.g.*, Arnold 140, Inman 243–44, Peters 401–02, Boucher 707–08, Zellner 861, Morgan 937, Wade 1145–46, 1149.

[111] Birrell 1287–88, 1294–96, Stewart 1350–51.

trend exists, and the Registry itself is essentially a product of electrical subcontractor initiative rather than general contractor demand.[112] In addition, there is impressive direct proof that the Registry does not in fact produce the "best price". In the first place, as the sanction incidents (*see* Findings 45–54) demonstrate, the disciplinary machinery of the Registry itself is more often than not invoked for the very reason that the general was offered (and accepted) a better price outside of the Registry.[113] Second, the whole notion of the Registry as the source of the "best price" was substantially demolished by the testimony of respondents' own witnesses to the effect that the purpose of the Registry is to reduce price-cutting pressures. Note, for example, the following testimony of Registry board member and president Barnett:

> My particular interest in the Registry is that it promotes ethical bidding practices. It tends to discourage and if not—I can't say eliminate, but the aim would be to eliminate unethical practices such as bid shopping, bid peddling, price cutting, things of this nature that go on when there are not bids provided or recorded and open to public review, and this is—this is the primary reason for the establishment of the Registry, and this has been the aim of the Registry ever since it was established and went into operation.[114] [28]

Barnett further testified:

> Q: Why do you think the price cutting and bid peddling, why do you think that's a bad practice in the industry? What does it do when it's there?
>
> A: Well, the only thing I can say is that it provides second opportunities for people to bid the job when we as general contractors are not provided that opportunity. It is—ever since I've been in the business, it's been considered as unethical practices. I was taught to believe this. I do believe it, and therefore, I don't subscribe to the theory of bid peddling or price cutting, and I personally try to discourage it anywhere I can, and I feel our Registry also does so.[115]

As for the prospect of inflated bids in the absence of a bid depository, Professor Birrell testified that the very purpose of the intensive telephone negotiations that characterize non-bid depository markets is to test for such inflation.[116]

44. The adverse impact on price attributed by complaint counsel's experts to the Registry's limitation on price negotiation and its segmentation of the market is confirmed by the sanction incidents. *See* Findings 45–54.

45. *Maler Construction Co.* Maler, a general contractor, was sus-

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[112] *See* Findings 7–8, 31–32. *See also* CX 159G; Inman 225, Peters 393.

[113] Stewart 1342.

[114] Barnett 1579–80.

[115] Barnett 1580. *See also*, CX 158B-C, CX 160B-C, CX 161"O"-Q; Barnett 1603–05, Martin 1691, 1699–1700, Chester 1712, 1726, Strong 1792–93, Dennis 1851.

[116] Birrell 1275–77, 1286–90.

pended from use of the Registry for the period July 27, 1977, to January 26, 1978. On the Lipsey's Seafood Restaurant job, Maler had agreed to accept Registry bids, but awarded the electrical work to a subcontractor who had not bid through the Registry. The unregistered electrical bid was some $300 lower than the lowest Registry bid. Maler claimed that it had to go outside of the registry when the architect of the job redesigned the specifications in order to reduce costs, but Allen Electric, the low Registry bidder, refused to rework its bid. Allen later filed the complaint against Maler which eventually led to Maler's suspension. While Maler's claim respecting the change in specifications [**29**] was not well established on the record, there is no question that a lower bid was made outside of the registry.[117]

46. *Inland Construction Co.* Inland, a general contractor, was suspended from use of the Registry during the period September 18, 1980, to March 17, 1981. On the Hickory Ridge Mall job, Inland permitted Haines Electric Co., which had bid through the Registry, to modify its bid after the Registry's filing deadline had passed. The modification consisted of Haines lowering its original bid by changing the "alternates" appearing on its bid sheet from additions to deductions. Haines' base bid was $749,120, and before the modification, its bid for Alternate 1 was $756,970 ($749,120 base bid + $7,850), $777,636 for Alternate 4 ($749,120 base bid + $28,516), and $778,320 for Alternate 5 ($749,120 base bid + $29,200). By changing each of these alternates from an addition to a deduction, Haines lowered its bid to $741,270 for Alternate 1, to $720,604 for Alternate 4, and to $719,920 for Alternate 5. The Registry charged Inland with violating its rules by accepting these price reductions from Haines.[118] In commenting on this incident, the Registry said—

> The Registry Office received several verbal complaints stating they believed Haines Electric Company violated the rules and regulations in that they changed their alternates from an add to a deduct. The rules and regulations of the Registry Service would not permit a firm to change a price or an alternate period. After an electrical contractor registers his bid he then has two options: (a) that it is to remain in the registry as bid or (b) to withdraw.[119] [**30**]

For its part in the Hickory Ridge Mall incident, Haines was suspended from use of the Registry between September 18, 1980, and March 17, 1981.[120]

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[117] CX 18A—CX 24, CX 137, CX 147A.

[118] CX 25A—CX 30, CX 138, CX 147B.

[119] CX 25B-C.

[120] CX 28B. In addition to being suspended for the Hickory Ridge Mall job, Haines was suspended from the Registry between May 28, 1982, and May 28, 1983, (subsequently changed to February 15, 1983, after an appeal) because of its actions on the V.A. Hospital-Ambulatory Care Addition job. This suspension came about after the Registry received a complaint letter from Anderson Electrical alleging that Haines had submitted Registry bids and then bid outside the Registry to a general contractor who was not using the Registry. Haines was suspended

(footnote cont'd)

47. *Dick Corporation.* Dick, a general contractor, was suspended from use of the Registry indefinitely beginning on September 11, 1980. The suspension was imposed because Dick agreed to accept electrical bids through the Registry on the City of Memphis' Volunteer Park Phase III job, but awarded the electrical subcontract to an electrical subcontractor (Wallace Electric) who had not bid through the Registry. The lowest base bid that Dick received through the Registry was $2,397,000 from Shelby Electric. Dick awarded the job to Wallace at a bid price of $2,180,000 for a slightly different scope of work after city officials determined at the last-minute that Dick's winning prime bid was above the amount budgeted by the city for the job. Confronted with this change, Dick attempted to negotiate a reduction from Shelby, either in the form of a new bid or an informal reduction of its existing bid. When this effort failed, Dick went outside of the Registry to Wallace.[121]

48. *APAC Tennessee Construction Co.* APAC Tennessee, a general contractor, was suspended from use of the Registry for six months beginning on January 5, 1982. On the Federal Express Headquarters Site Work job, APAC accepted Registry bids, but awarded the job to a bidder outside the Registry. The outside bid was some $4,000 lower than any bid received through the Registry, taking into account an adjustment made for a modified scope of work.[122] **[31]**

49. *Engineering Management Co.* Engineering Management, a general contractor, was suspended from use of the Registry for one month beginning on August 25, 1982. This suspension originated with the River Place job on which Engineering Management permitted Mann Electric to change its price after the Registry's deadline had tolled. Mann's original base bid through the Registry was $129,830. Allen Electric filed with the Registry a base bid of $104,500 plus additional charges for office space work. When Arnold, president of Engineering Management, spoke to Mann about the scope of the work in Mann's bid, he learned that Mann's bid actually was some $9,000 lower than Allen's bid since Mann had intended that its base bid include a substantial amount of office space work. At the disciplinary hearing before the Registry Board, Arnold tried to explain that the bids were ambiguous, and needed clarification before they could be fairly compared, but the Registry suspended his firm anyway.[123] For its part in the River Place violation, Mann Electric was suspended from the Registry for one month beginning on August 25, 1982.[124]

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even though it had submitted identical bids both inside and outside the Registry, and its Registry bid was the lowest bid among the Registry bidders. CX 86B—CX 97; Dennis 1928–30.

[121] CX 32A—CX 39, CX 139A, CX 148A, CX 152A-E; Peters 348–57, 410.

[122] CX 41A—CX 46B, CX 123, CX 139B, CX 148B, CX 153; Morrison 575–92.

[123] CX 47D—CX 51B, CX 127, CX 140, CX 149A; Arnold 80–92, Mann 288–90.

[124] CX 51B. In addition to being suspended for its role in the River Place job, Mann was suspended from the Registry from June 3, 1983, through December 2, 1983, in connection with the Kroger Southaven Store job. This

(footnote cont'd)

50. *Ben J. Malone Co.* Malone, a general contractor, was suspended from use of the Registry for six months beginning on August 25, 1982. This sanction was imposed when Malone accepted Registry bids on the Federal Express Power Roof Exhauster and Ventilators job, but awarded the contract to an electrical subcontractor bidding outside the Registry. Malone had received six bids through the Registry, ranging from Anderson [32] Electric's $185,220 to Chisca Electric's $433,356. Malone also received a bid for $166,000 outside of the Registry from American Electric. Although American's bid was for a slightly different scope of work. Malone considered American's bid more favorable than any Registry bid in terms of both price and scope of work. Moreover, since Malone had used American previously, and was familiar with the quality of its work, this low outside bid was especially attractive. The disciplinary action against Malone was initiated by Anderson Electric.[125]

51. *Martin Construction Co.* Martin Construction, a general contractor, was suspended from use of the Registry for six months beginning on September 14, 1982. On the Memphis Area Transit Authority, Office Modifications job, Martin agreed to accept Registry bids, but awarded the subcontract to an electrical subcontractor bidding outside the Registry whose bid had not been registered. Martin had gone outside of the Registry because "Curley" Morgan, Martin's estimator, was disappointed when he received only three bids through the Registry. These bids were for $28,860 (Mid City Electric), $31,384 (Chisca Electric), and $39,502 (Comm. & Ind. Electric). The low Registry bidder (Mid City Electric) called Morgan after the bids were delivered by the Registry to declare its withdrawal, claiming mistake. As a result of the Mid City withdrawal, Morgan was left with only two Registry bids. Morgan testified that he was surprised that Mid City Electric had withdrawn its bid on the basis of an alleged mistake since the bid was only 10 percent lower than the next lowest bid in the Registry. In Morgan's experience, bids containing mistakes are usually 25 to 30 percent lower than the next lowest bid. Because of the sudden withdrawal of Mid City, Morgan sought to obtain bids outside the Registry before placing his own bid for the prime contract. Morgan called several electricals, and eventually received a bid from A.C. Electric which was $4,000 lower than the bid withdrawn by Mid City Electric. Using this lower outside electrical bid, Morgan became [33] the suc-

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suspension came about after the Registry received a complaint letter from Carson Electric alleging that Mann had bid both inside and outside the Registry on the Kroger job. Man explained to the Registry that the successful general contractor, R. Naylor & Co., who had not indicated a willingness to accept Registry bids, had telephoned Mann after Naylor won the prime contract to determine if Mann Electric wanted the electrical job. Mann quoted Naylor the same price for the electrical work that Mann had bid through the Registry. Despite this explanation, the Registry suspended Mann. Mann's quotation was $15,950 lower than any other bid received by Naylor outside of the Registry. CX 105A—CX 110; Mann 291–92, Naylor 1053–65.

[125] CX 52B—CX 59, CX 141, CX 149B; McGroom 779–94.

cessful low bidder on the prime contract. Morgan testified that if he had used the lowest bid remaining in the Registry after Mid City withdrew, his firm would not have won the prime contract. The hearing which resulted in the disciplinary sanction was scheduled after the Registry received a complaint from Chisca Electric (the low Registry bidder after Mid City withdrew), requesting that the Registry investigate Martin's award of the electrical subcontract outside of the Registry.[126]

52. *C.R. Boucher Construction Co.* Boucher, a general contractor, was suspended from use of the Registry during the period January 24, 1984, through July 24, 1984, because it had agreed to accept Registry bids on the Honey's Auto Parts Store job but awarded the electrical subcontract to a firm that had not bid through the Registry. Boucher accepted the outside bid because it was approximately $1,000 below any Registry bid. As it happens, Boucher only won the prime contract by being less than $1,000 lower than any other general, and probably would not have obtained the prime contract but for the lower outside electrical bid.[127] The Registry's disciplinary action against Boucher was initiated following the receipt of a complaint from Allen Electric, the low bidder in the Registry.

53. *Crown Electric Co.* Crown, an electrical subcontractor, was suspended from use of the Registry from March 8, 1978, until April 7, 1978, when it violated the Registry's rules requiring that all bids must be made in exact compliance with the plans and specifications. Crown's Registry bid of $55,000 for the electrical work on the Federal Express Town and Country Shopping Center was substantially lower than the next lowest Registry bid of $89,500. When the Registry office contracted Crown to ask about this discrepancy, Crown explained that its bid excluded a generator which would have raised the bid by some $26,000 to $81,000, or still $8,500 lower than the next lowest [34] Registry bid. In suspending Crown, the Registry Board noted that "the bid price was significantly lower than the next lowest price but not qualified to indicate a variance from the plans and specifications of the project."[128] In effect, the Registry suspended Crown for trying to use the Registry while keeping open the option of negotiating with the winning general about doing the work in a different way (namely, that the general shop independently for a generator), and at a substantially lower price than that offered by the other Registry bidders.[129]

54. *A–1 Electric Co.* A–1, an electrical subcontractor, was suspended from use of the Registry from November 30, 1979, through May 30,

[126] CX 60A—CX 63B, CX 142, CX 150A; Morgan 890–901.
[127] CX 64A—CX 69, CX 143, CX 150B; Boucher 686–91.
[128] CX 72B.
[129] CX 70—CX 75B, CX 144, CX 151A.

1980, because it submitted a bid through the Registry on the Dobbs House project, and then submitted a lower bid directly to the awarding authority. A–1's original bid through the Registry was $87,345. Later, when a mistake was uncovered, it changed its bid to $79,111 in bidding directly to the awarding authority.[130]

55. Stewart examined the ten sanction incidents described in Findings 45–54 for added costs fairly attributable to the Registry: that is, what the effect on the winning electrical bid would have been if the Registry rules had operated effectively to eliminate [**35**] the violation, usually in the form of acceptance of lower outside bids. Stewart's analysis is shown in Table 2, below:

Table 2

Effect Of Registry Rules In Inflating Winning Electrical Bids

(1) Sanction Incident	(2) Winning Electrical Bid	(3) Maximum * Inflation If Registry Rules Had Operated	(4) Col. 3 as % of Col. 2
Maler	$8,865.00	$300.00	3.38
Inland	720,604.00	56,979.00	7.90
Dick	2,180,000.00	217,000.00	9.95
APAC	225,400.00	4,000.00	1.77
Engineering Mgt.	98,480.00	6,020.00	6.11
Malone	166,000.00	19,220.00	11.57
Martin	27,515.00	3,869.00	14.06
C.R. Boucher	12,480.00	680.00	5.44
Crown	81,000.00	8,500.00	10.49
A–1	79,111.00	389.00	.04
TOTALS	$3,599,455.00	$316,957.00	8.8% or 10 incident average of 7.1%

Sources: CX 146; *see also* Stewart 1357–86; CX 136A—CX 145, CX 147A—CX 151B.

* Stewart also calculated minimum price inflations based upon record evidence that certain jobs involved alternatives requiring adjustments in columns 2 and 3. *See* Stewart 1385–86 and CX 146.

56. Stewart argued that in addition to the impact on price resulting from the limitations on negotiations and segmentation of the market,

[130] CX 80—CX 85, CX 145, CX 151B. Other incidents of suspension of electricals involved Binghampton Electric Co. and Chisca Electric Co. Binghampton was suspended from the Registry from March 21, 1978, through September 20, 1978, in connection with the 980 South Third Street job because it allegedly submitted a bid to a general contractor that was different from the bid filed with the Registry for the same general. Binghampton attempted to explain to the Registry board that its "outside" bid was merely an attempt to clarify its illegible Registry form, but Binghampton was suspended anyway. CX 75C—CX 79. Chisca was suspended from using the Registry from November 19, 1982, through January 19, 1983, in connection with the Tennessee Air National Guard, Jet Fuel Storage job because it altered its bid to the successful general contractor after the bid registration deadline set by the Registry. CX 99A-B, CX 103. In still another incident, Chisca was absolved by the Registry's board of the charge of improperly changing its bid on the IRS-SCRS Computer Room Expansion job. RX 2A-R.

the Registry increases the likelihood that electrical subcontractors may engage in bid rigging or other forms of price-fixing by providing a forum for the conspirators, as well as a mechanism for immediately detecting violations of any price-fixing agreement.[131] I have given little weight to this speculation since there is no evidence whatever that the Registry has been used as a front for a price-fixing agreement or to allocate contracts, and no convincing reasons were advanced by Stewart for speculating about the possibility of conspiracy in a [36] construction industry in which actual conspiracy is rampant without the aid of bid depositories.[132]

H. *Respondents' Proffered Justifications*

57. Respondents not only claim that the Registry produces the lowest possible prices (*see* Finding 43), but also that the rules of the Registry are justified because of their contribution to improve efficiency in the bidding process, as well as for their elimination of evils associated with bid peddling.[133] *See* Findings 58–62.

58. The three-hour bidding deadline imposed by the Registry was defended as simply a modest extension of prevailing custom in the Memphis area where it is the practice of some generals to require subcontractors to submit their bids by noon so that the generals may prepare their bids by the customary 2:00 p.m. prime bidding deadline.[134] This deadline is not incorporated in any formal rule, and the evidence indicates that there is far from universal compliance with the custom.[135] Moreover, this informal deadline does not preclude, as the Registry's rules do, a general contractor from engaging in price negotiation after a subcontractor's bid has been submitted.[136]

59. It was contended by several witnesses that the time limitations imposed by the Registry were designed to eliminate chaos in the bidding process and to establish a more orderly procedure.[137] There is no evidence, however, that without a registry the bidding process is beyond the capability of general contractors who, in fact, seem to function quite efficiently in dealing over the telephone with firms in other trades which [37] freely make price changes up to the last minute before the general's prime bid is due.[138] Besides, to the extent

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[131] CX 155X-Y; Stewart 1386–89.

[132] *See e.g.*, Stewart 1466–67.

[133] *See*, however, admission of Registry president Barnett that the Registry does not increase competition and "its not the intent to increase competition". Barnett 1607.

[134] Zellner 861–63, Barnett 1583–85, Martin 1628–29.

[135] Zellner 862–64, Barnett 1584, Martin 1663–65.

[136] Zellner 868–69, Stewart 1399–1400, Martin 1663–65.

[137] Strong 1766; *see also* Martin 1633.

[138] *See* Findings 36–40. Arnold 63, 198–99, Inman 211–12, 224, Peters 410–11, Baker 490–91, Morrison 567–69, 593–96, Boucher 676–77, 695, Zellner 814–15, 817–18, 834–35, 843, Morgan 923–24, Naylor 1066–67, 1072, Wade 1120–27, Barnett 1604–05. One of respondents' witnesses, Dennis, an electrical subcontractor and member of the Registry board, even suggested that the Registry itself may be a source of disorder if, for example, a general did not decide until the last minute to take Registry bids necessitating a frantic effort to inform electricals that they

(footnote cont'd)

that the Registry does provide a service (written bids, presented in standardized form, and delivered according to a fixed time schedule) which some general contractors may desire, this hardly justifies the Registry's absolute restrictions on all alternative forms of bidding, including last-minute bidding by telephone before the deadline (all bids must be physically filed with the Registry, see Finding 24), or the Registry's restrictions on negotiating with those subcontractors who have filed within the deadline.[139] As it happens, the significance of the claimed efficiency must be vastly overstated since there is no evidence that general contractors have sought to replicate the Registry in other trades, or that the impetus for the Registry comes from anyone except the electrical subcontractors. Moreover, even assuming that for some reason (unrevealed in this record), closed, written electrical bids, which are delivered at a fixed time, are needed by a particular general, this could be accomplished without the restrictive superstructure of the Registry by the simple expedient of a statement by the general that it wants its bids in that fashion as a condition for doing business with it.[140]

60. The opinion was expressed by some witnesses that bid peddling is unethical because the subcontractor who is forced by last-minute pressures to lower a previously submitted bid may do so by cutting corners on quality to the point that safety hazards [38] may be created.[141] No witness, however, could identify a single job on which quality or safety were put in jeopardy as a result of bid peddling.[142] Moreover, since the construction industry routinely uses several levels of inspection—by architect, engineer, general contractor, and government inspectors[143]—to determine compliance with specifications and to assure that quality and safety requirements are met, it would take a deliberate decision to engage in subterfuge for the subcontractor even to attempt to avoid these standards. On this record there is no evidence that such malfeasance is any more or less prevalent among "shopped" or "peddled" subcontractors than it is among par-

should submit bids through the Registry for that particular general. Dennis 1854. *See also* Stewart 2074–75 for a discussion of the additional informational burden created by the Registry since generals and subs must determine who is bidding inside and outside of the Registry.

[139] Stewart 2047–49, 2052–55.

[140] Stewart 2048–49.

[141] Barnett 1579–83, Martin 1632–33, 1635–37, Chester 1706–07, 1710–13, Dennis 1850–51, 1856–63, Scurlock 2012. The more general claim that the Registry seeks to eliminate bid peddling because it is "unethical" (*see, e.g.*, CX 161J); Barnett 1579, Dennis 1911) does not state a cognizable economic efficiency. Birrell 1292–93. By the same token, the Registry cannot properly be justified by referring to closed bidding systems operated by buyers like the federal government. The public policy considerations behind such systems, namely, the paramount importance assigned to the appearance of fairness, is not properly invoked to defend a system designed essentially to avoid price cutting. *See* Stewart 1396–1400.

[142] *See, e.g.*, Morrison 570, Barnett 1598–99, Chester 1724, 1735–38, Strong 1798–99, Dennis 1902–04. As it happens, respondents introduced no evidence relating to the prevalence of bid peddling either before or after the creation of the Registry.

[143] Morrison 643–44, Martin 1636–37, 1645–46, Chester 1727–29, Strong 1771–79.

ticipants in the Registry.[144] What the record does show is that generals, a group of expert buyers, routinely make their own estimates of what the work of a sub-trade should cost, and that they then review sub-bids to determine if they are suspiciously low.[145] A bid from a financially suspect or managerially inept subcontractor, who might be tempted to skimp on quality, is likely to be rejected no matter how attractive it may seem.[146] Again, it is also significant that there is no record proof that the Registry operates at the request of contractors who, it may be fairly assumed, would be vigorous [39] supporters of such an institution if it were identified as a guarantor of quality.[147] A more plausible scenario than the sacrifice of quality predicted by respondents, is that a subcontractor will react to downward pressures on price by pressuring their established suppliers for a concession, or by bending every effort to determine if there are alternative and lower-priced sources available for materials and labor, but sources that do not compromise quality.[148] Another avenue that might be pursued by the pressured subcontractor is to review margins for the purpose of determining whether the job is worth doing at a reduced profit.[149] These ways of reducing price are more likely to be followed than a sacrifice of quality since such a compromise must not only survive the various levels of inspection described above, but even if it were not detected in the building stage and was only uncovered later by the owner, this could lead to a blemish on the reputation of a subcontractor which could translate into no future contracts at any price.[150]

61. The argument was made that the low bid resulting from bid peddling is conducive to procrastination. This could occur, it is alleged, when a subcontractor yields to bid peddling pressure knowing that at the low bid price it cannot properly perform the work, but takes on the project anyway in anticipation that somewhere down the line a more attractive project may materialize, and then both jobs can be completed profitably. While it is claimed that this kind of bid strategy can lead to costly delays, no proof was adduced as to its actual occurrence.[151] [40]

62. Finally, there was testimony that the Registry is designed to protect the subcontractor's investment in working up a bid. The argument was made that a sealed bid system of the kind operated by the

[144] CX 155Z1; Strong 1799–1800, Dennis 1887–92.

[145] Wade 1127–28, Birrell 1200–04.

[146] Birrell 1197, 1200–01, 1208–09, Martin 1632, 1667–68.

[147] *See* Finding 32.

[148] Morrison 604–05, Wade 1122–23, 1136–37, 1146–47, Birrell 1242–43.

[149] *See, e.g.*, Mann 316, Morrison 599–600. Included in a subcontractor's bid is a profit component that is hardly inflexible: it is an estimate derived from expectations respecting future workload, the likelihood that more lucrative of projects may emerge, and the competitive state of the market. Birrell 1199–1200.

[150] *See* Martin 1643–44, Chester 1723–24, Strong 1803–04, Dennis 1890–91.

[151] *See* Strong 1757–58, 1762–66.

Registry is necessary in order that a subcontractor's bid, which can cost thousands of dollars to compile, is fairly considered on its merits, and is not used simply as bait for the purpose of obtaining a still lower bid.[152] There is no evidence, however, that there exists a group of subcontractors who are willing to take a "free ride", in the sense that they do not compose their own bids and simply sit back, waiting to be shopped in the expectation that they will simply undercut whatever their competitors may bid.[153] Besides, the record evidence showing that electricals have varying costs suggests that blind reliance on a competitor's figures would involve the considerable risk of a costly miscalculation.[154] **[41]**

III

Discussion

In bidding for the prime contract on construction jobs, general contractors assemble subsidiary bids from the electrical and other specialty trades. The Electrical Bid Registration Service of Memphis, Inc. ("Registry") was formed by the National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), for the purpose of placing various restrictions on the process by which Memphis area electrical subcontractors submit such sub-bids to general contractors. These restrictions take the form of Registry rules requiring electrical subcontractors who use the Registry to submit their sealed bids, which may not be changed, no later than three hours before the deadline for the opening of the general contractors' prime bids. This temporal limitation, designed to eliminate bid peddling (the practice of disclosing one subcontractor's bid to another subcontractor in an attempt by a general contractor to get a still lower sub-bid), effectively cuts off all price negotiation during the crucial three hour period prior to the generals' customary bidding deadline. The Registry also impacts on the bidding process by segregating firms bidding in the Registry from possible price cutters bidding outside of the Registry. This segmentation of competition is accomplished by a Registry rule prohibiting electrical subcontractors from bidding both inside and outside of the Registry, and complimentary rules that (1) forbid general contractors from accepting bids both inside and outside of the Registry, and (2) require the generals who agree to accept Registry bids to award the job to an electrical subcontractor (but not necessarily the low bidder) who has bid through the Registry. The record reveals that

[152] Strong 1756, 1768–69, Dennis 1864–67.

[153] *See, e.g.*, CX 155Z1; Martin 1647–49, 1677–78, Stewart 2055–59.

[154] Stewart 2055–59.

these Registry rules are enforced, and that disciplinary proceedings and accompanying sanctions—mostly suspensions of various lengths—are usually invoked when a general contractor, [42] learning of a better bid outside of the Registry, decides to ignore the Registry bids in favor of the lower outside bid.

Complaint counsel maintain that even if the practices described above are not governed by the per se rule against a price fixing conspiracy, the Registry and the Memphis Chapter are engaged in a restraint designed to impact on price negotiations, which should be treated under the modified rule of reason analysis applied in *NCAA v. Board of Regents*, 104 S.Ct. 2948 (1984). There, the NCAA had entered into contracts with television networks limiting the number of times any one college could have its football games televised, and, in effect, establishing the price that each college could receive from the networks for televising its games. These collective agreements with the networks were complemented by NCAA rules prohibiting its members from negotiating independently for the broadcast of individual games based on the popularity or caliber of the teams involved or viewer interest in a particular contest. Violations of the NCAA rules subjected members to sanctions, including possible expulsion from the organization or a suspension of television appearances. While the restraints in *NCAA* obviously involved tampering with price competition, the Supreme Court declined to follow a per se approach since collegiate athletics by its terms must involve some forms of collective agreement—for example, joint decisions respecting eligibility of students to participate in athletics—and therefore the plausibility of any procompetitive justification (such as injection of new forms of competition, the facilitation of entry, and the broadening of consumer choice) should be weighed against proven harm. In its approach to facially suspect but perhaps justifiable conduct, *NCAA* was a logical extension of *Broadcast Music, Inc. v. CBS*, 441 U.S. 11 (1979) where the per se rule was not invoked when the practice in question—blanket licensing of the rights to broadcast copyrighted musical compositions—was defended as the only practical way of achieving cost-effective distribution (and of solving the concomitant problems of monitoring use and receiving payment of royalties) in a market characterized by thousands of copyright [43] owners and millions of compositions. The Court's remand decision in *Broadcast Music* indicates that this apparently acceptable efficiency justification was to be weighed against the fact that the questioned practice obviously tends to reduce any incentive toward price competition among composers with whom the networks may have preferred to deal on a basis other than a blanket license arrangement.

As it happens, application of *NCAA* and *Broadcast Music* to this

case would represent a departure from earlier bid depository decisions—*Christiansen v. Mechanical Contractors Bid Depository,* 230 F.Supp. 186 (D. Utah 1964), *aff'd,* 352 F.2d 817 (10th Cir.), *cert. denied,* 384 U.S. 918 (1966), and two cases decided under the California antitrust law, *People v. Inland Bid Depository,* 233 Cal. App. 2d 851, 44 Cal. Reptr. 206 (Dist. Ct. App. 1965), and *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.,* 4 Cal. 3d 354, 93 Cal. Reptr. 602, 482 P.2d 226 (1971)—in which the approach taken by the courts was one of virtual per se condemnation of the practice as either a price-fixing conspiracy or a group boycott (that is, a boycott of nonparticipating or suspended general contractors or subcontractors) with little attention to actual harm or possible justifications.[155] It is clear, however, from the plain language of the complaint that this case is grounded on the theory that the mere fact that prices are tampered with in the sense that price negotiation is limited, does not resolve the question of legality, and consistent with *NCAA* and *Broadcast Music,* complaint counsel must show actual or probable anticompetitive effects from the challenged practice while respondents are to be given an opportunity to demonstrate procompetitive benefits. [44]

In *NCAA* itself, the two-part, modified rule of reason analysis proceeded from the assumption that the television plan was essentially a horizontal output restriction, which potentially could raise prices or minimally establish a price structure that was both unresponsive to viewer demand and unrelated to the prices that might prevail in a competitive market. The Supreme Court then said that these presumed effects shifted a "heavy burden" (*NCAA,* 104 S.Ct. at 2967) to the NCAA which had to show that the restraint on price negotiation was justified because it resulted in procompetitive efficiencies. In concluding that this burden was not met, the Court disposed of the notion that a rule of reason analysis is synonymous with examination of a wide gamut of possible justifications. The Court held that once it is demonstrated that a questioned practice operates as a restriction on price or output, only convincing proof that competition has been enhanced is to be considered. Thus, the Court specifically rejected the argument that the television restriction was necessary to promote live gate attendance since acceptance of this approach would be tantamount to saying that if a product was sufficiently unattractive to consumers then it may qualify as a candidate for removal from competition itself. *Id.* at 2969.

[155] Support for the application of the per se rule to bid depositories can be found in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), where the Supreme Court condemned without consideration of possible justifications "[a]ny combination which tampers with price structures." *Id.* at 221. The Court applied the per se rule not only to agreements among sellers to set uniform prices directly, but also to any agreement whose purpose is effectively to control the price of a product or service (*Id.* at 222–23), the acknowledged objective of the Registry. *See, e.g.,* Findings 13, 21, 43.

Applying *NCAA* to the instant case, complaint counsel has the burden of proving, as in fact the complaint alleges, that the Registry produces anticompetitive effects, the most significant being that the Registry causes or probably causes an increase in the cost of electrical subcontracting services in the Memphis area. As indicated in the Findings, complaint counsel has met this burden through expert testimony corroborated by the actual experience of general contractors and electrical subcontractors as well as the record evidence respecting the so-called "sanction" incidents. Also, consistent with *NCAA*, once complaint counsel had shown that the Registry rules cutting off negotiation and segmenting bidding tend to create price-enhancing influences on jobs bid through the Registry, a detailed analysis of market power, including definition of market and market shares, becomes superfluous. *NCAA*, 104 S.Ct. 2965–67. Moreover, it should be noted [45] that as a practical matter the Registry's rules must embrace an economically significant segment of Memphis construction work for how else could one account for the perception of general contractors that they are pressured to use the Registry whenever it is in operation in order to obtain a full complement of competitive bids. Besides, respondents themselves must be convinced of the economic importance of eliminating price cutting on jobs going through the Registry for otherwise there would be no point in their imposition of the Registry's highly restrictive bidding rules. *See, e.g., Washington Crab Assn., et al.*, 66 F.T.C. 45, 119 (1964).

Since complaint counsel has met its burden under *NCAA*, I next turn to the question of whether respondents have shown countervailing procompetitive justifications. As respondents would have it, not only does the Registry produce the ultimate procompetitive effects contemplated by *NCAA* in the form of the lowest possible prices, but it is also said to facilitate the orderly preparation of bids while eliminating unethical practices which if left uncontrolled could produce quality or even safety problems. This particular array of proferred justifications was obviously intended to bring the Registry within the four corners of *Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of South Carolina*, 436 F.Supp. 418, *aff'd* 569 F.2d 821 (4th Cir.), *cert. denied*, 439 U.S. 910 (1978). There the mechanical subcontractors in South Carolina had entered into contracts with most of the general contractors in the area requiring the generals to reject the bids of mechanical subs that had been submitted less than five hours before the generals' bidding deadline. Cullum, a mechanical subcontractor, had its low bid rejected because it had been submitted after the prescribed deadline. In assessing the impact of the bid depository under Sherman 1, the District Court said that the arrangement was not intended to fix prices, but was designed instead

to eliminate what it characterized as chaotic bidding and bid peddling. The court then concluded that the registry's elimination of last-minute bidding and bid peddling did not have an impact on price because the members of the registry testified that these [46] prohibitions encouraged them to make their registry bids at the lowest price possible. Clearly it was this evidence that led the lower court in *Cullum* to conclude—

> The record before the court in this case is devoid of any indication that the five-hour bid procedure was devised by the [mechanical subcontractors] with any intention whatsoever of fixing prices. More significantly, however, the record also fails to reflect that the five-hour bid procedure has had any effect whatsoever upon prices, whether to raise, lower or stabilize them. Plaintiff has simply failed to establish that general contractors are paying the same amount, or a greater or less amount for mechanical work than they would pay under a system not regulated to eliminate such practices as bid peddling. 436 F.Supp. at 427.

In sharp contrast to *Cullum,* here there is an impressive record proof that the Registry rules do in fact impact adversely on price. For notwithstanding the claim that subcontractors are encouraged to give their best price to the Registry since they know there will be no peddling under the Registry's rules, both the expert testimony and other evidence in this record show that a businessman's self-serving statement that he has given his best price amounts to little more than hyperbole which must be tested in the marketplace. As Professor Stewart observed, every businessman believes that his price is the best price and that his profit margins are fair. The function of the market is to test this "best price" hypothesis and to make certain that margins do not reflect what businessmen want rather than what competition will allow. That the Registry serves to insulate margins from such competitive pressures is shown in part by the fact that in most instances Registry sanctions were imposed because some subcontractor outside of the Registry had offered a price that was lower than the lowest price offered through the Registry. Equally impressive is the testimony of respondents' own witnesses who said that the purpose of the Registry is to eliminate price cutting, which must of necessity mean that to the extent that the Registry carries out this acknowledged purpose, it produces prices that could have been lower. It is also significant that the impetus for the Registry comes from the electricals, and not from the generals who presumably would [47] sponsor a bid depository of their own, or replicate it on an individual job basis, if they were convinced that this kind of limitation on negotiation actually produces the best possible price.

As for the conclusion in *Cullum* that in the absence of a bid registry the result would be a chaotic inefficiency, most of the credible evi-

dence in this record is to the contrary. The record shows that Memphis general contractors operate quite efficiently in other specialty trades without a bid depository. In point of fact, what the *Cullum* court described as a "chaotic situation" (436 F.Supp. at 420), on this record amounts to nothing more than the usual give-and-take of price negotiation that may result in lower prices as the deadline approaches for the generals' prime bid.

Finally, the *Cullum* decision reflects a view about the ethical propriety of bid peddling that is not only contrary to *NCAA's* admonition that only procompetitive efficiency justifications are to be considered, but it is also at odds with the Supreme Court's opinion in *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). There, too, a group of businessmen attempted to surround a restrictive practice (an association rule prohibiting price bidding and only allowing a discussion about price after an engineer had been selected) with an ethical aura by claiming that competitive bidding would so tempt engineers to ignore safety factors, that a total exemption from the antitrust laws was required. The Supreme Court rejected out of hand this kind of frontal assault on the basic premise of the antitrust laws, to wit, that competition is to determine price and quality, and the Court held that except for extraordinary circumstances, competition is not to be eliminated in the name of the ethical norms of private groups.[156] Certainly no such extraordinary circumstances were shown on this record. On the contrary, the record shows that built into the construction [48] industry is an elaborate system of specifications and inspections to make certain that quality standards are maintained. In a word, if there is a problem of inferior quality in the construction industry, it exists with or without bid peddling, and with or without bid depositories.

In contrast to the substantial evidence showing that the Memphis area electrical bid depository is an unreasonable restraint of trade because of its unjustified impact on price competition, there was a failure of proof respecting the complaint charge that the Registry contributes to collusive agreements. On this issue, I see no reason for following an economist's speculative rumination over how a bid depository may make collusive agreements more readily enforceable when the track record of the construction industry shows that collusion is endemic without the aid of such "enforcement".

As for the complaint allegations respecting the role of the Memphis Chapter, the record shows that it was the guiding light behind the creation of the Registry in the first place, and that its influence on the

[156] Earlier, in *Fashion Originators Guild of America (FOGA) v. FTC,* 312 U.S. 457 (1941) the Supreme Court said that even if design piracy were a tort under state law, it would not justify the severe restraint of a collective refusal by clothing designers to deal with distributors of unauthorized copies of their designs.

Registry persists to this day: the electrical subcontractors on the first Registry board came from the membership rolls of Memphis Chapter, the first Registry board selected the next board and so on, and the only manager the Registry has ever had is Scurlock, manager of the Memphis Chapter. It is inconceivable that Scurlock, who is only compensated by the Memphis Chapter, would operate the Registry in a way that was inconsistent with the interests of the Memphis Chapter. In short, the Registry is nothing more than an alter ego or disguised continuation of the old bid depository operated by the Memphis Chapter, and it would be turning precedent on its head to say that the successor (the Registry) may be named in an order, but not the originator (Memphis Chapter). *See, P.F. Collier & Son Corp. v. FTC,* 427 F.2d 261 (5th Cir.), *cert. denied,* 400 U.S. 926 (1970).

While the responsibility of Memphis Chapter for the policies and acts of the Registry is manifest, there is no basis on this record for issuing an order that is binding on the individually named respondents. Under complaint counsel's theory of individual [**49**] responsibility, any four electrical subcontractors serving on the Registry's board are liable if for no other reason than that they constitute a majority. This liability, according to complaint counsel, attaches irrespective of the lack of evidence that the four imposed their will on the other board members, or the total failure of proof respecting the named individuals' participation in the day-to-day affairs of the Registry. This is a flimsy basis for naming individuals, and is not supported by the cases holding that individuals are properly named only when they control or actively manage an enterprise, and an order could be evaded if they were not named. *FTC v. Standard Education Society,* 302 U.S. 112 (1937); *Doyle v. FTC,* 356 F.2d 381 (5th Cir. 1966). In contrast, even if such an order were justified here on the basis of actual control or management of the Registry by the individual respondents (and, again, no such record was made), it would be an exercise in futility since any named four could be replaced immediately by a fresh foursome who had not been named. [**50**]

IV

Conclusions

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.

2. The acts and practices charged in the complaint took place in or affected commerce within the meaning of the Federal Trade Commission Act.

3. Respondent, the Memphis Chapter, was instrumental in creating

the Registry, and the Memphis Chapter has perpetuated its influence over the Registry by designating electrical subcontractors as a majority of the Registry's board, and by installing the manager of the Memphis Chapter as manager of the Registry.

4. By its terms, the Registry's rules cut off price negotiation after the Registry's deadline, prohibit subcontractors from bidding both inside and outside of the Registry, and require general contractors who agree to accept Registry bids from awarding the job to a subcontractor bidding outside of the Registry.

5. The operation of the Registry as described in Paragraph 4 above, actually or probably increases the price for electrical services by arbitrarily cutting off price negotiation and by segmenting the bidding market into two distinct sets of electrical bidders—those in the Registry and those outside.

6. The adverse effects of the Registry are not offset by any procompetitive justification, and no convincing showing has been made that the Registry is necessary for quality, safety, or for any other reason.

7. The Registry and the Memphis Chapter have engaged in an unreasonable restraint of trade. **[51]**

8. There was a failure of proof as to responsibility of the named individual respondents for the acts of the Registry or for the need to name the individual respondents in order to obtain effective relief.

Accordingly, the following order should be issued:

ORDER

I.

It is ordered, That respondents The Electrical Bid Registration Service of Memphis, Inc. ("Registry"), a corporation, its successors and assigns, and the National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), a corporation, its successors and assigns, and respondents' agents, representatives, and employees, directly or indirectly, or through any corporate or other device, in connection with the awarding of building construction contracts or subcontracts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any course of action, agreement, combination, or conspiracy with each other, or with electrical subcontractors or general contractors in the greater Memphis area:

(1) That requires or provides that electrical subcontractors using the services of a bid registration service are prohibited from or are

subject to any disciplinary action or threat of disciplinary action for (a) negotiating, after the deadline for the filing or deposit of bids with the bid registration service, with general contractors using the services of the bid registration service; (b) submitting further bids to such general contractors after the deadline for the filing or deposit of bids with the bid registration service; or (c) [52] accepting a contract at a price other than the price submitted by such electrical subcontractors through the bid registration service prior to the deadline for the registering of bids;

(2) That requires or provides that general contractors using the services of a bid registration service are prohibited from or are subject to any disciplinary action or threat of disciplinary action for (a) negotiating, after the deadline for the registering of bids with the bid registration service, with electrical subcontractors using the services of the bid registration service; (b) attempting to obtain or obtaining further offers to perform jobs for which bids were taken through the bid registration service; or (c) awarding contracts to electrical subcontractors at prices other than those submitted through the bid registration service prior to the deadline for the registering of bids;

(3) That requires or provides that any person or firm that uses a bid registration service with respect to any specific job must (a) receive or solicit bids from, or submit bids to, only those persons or firms that are using the services of the bid registration service with respect to that job; or (b) register with the bid registry a copy of any bid that it has received or solicited from, or has submitted to, any person or firm that is not using the services of the bid registration service with respect to that job; [53]

(4) That requires or provides that any person or firm that in any fashion uses a bid registration service must receive or solicit bids from, or submit bids to, only those companies, firms, or individuals that are also members of, signatories to, or participants in said bid registration service;

(5) That in any manner prohibits, restricts, or discourages price negotiation between an electrical subcontractor and a general contractor or awarding authority, including, but not limited to, (a) declaring such price negotiation to be unethical or improper; (b) taking or threatening to take punitive or disciplinary action against a person or firm for engaging or attempting to engage in such price negotiation; or (c) urging, inducing, or encouraging electrical subcontractors or general contractors to refrain from such price negotiation; or

(6) That has the purpose or effect of unreasonably restraining price competition for electrical subcontracting services.

Provided that, nothing in this order shall prohibit the Registry from charging a reasonable fee (a) to a general contractor who uses the

services of the Registry for a particular job and awards the subcontract for that job to a nonparticipating subcontractor; or (b) to a subcontractor who uses the Registry on a particular job and is awarded the subcontract for that job by a nonparticipating general contractor.

Provided further that, nothing in this order shall prohibit the respondents from (a) complying with the unilateral request of an awarding authority that a job be listed on a [54] sealed-bid basis without further price negotiation; or (b) seeking or petitioning for legislation concerning bidding procedures in the construction business.

II.

It is further ordered, That the Registry shall immediately reinstate any firm suspended from participation in its bid registration service, which suspension resulted from conduct engaged in by respondents, which hereafter would amount to a violation of this order.

III.

It is further ordered, That the Registry and the Memphis Chapter, within ninety (90) days after the date of service of this order, remove from their respective constitutions, by-laws, codes or standards of conduct, rules, regulations, existing policy statements, or guidelines, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part I of this order.

IV.

It is further ordered, That:

A. The Registry shall within fifteen (15) days of the date of service of this order distribute a copy of this order to all persons who are employees, officers, or directors as of the date of service of this order and to all persons or firms that have participated in the Registry at any time prior to service of this order. Furthermore, within fifteen (15) days of the date that any person becomes an employee, officer, or director of the Registry, its successors or assigns, or any person or firm becomes [55] affiliated with or commences participation in the Registry, its successors, or assigns, the Registry shall distribute a copy of this order to any such person or firm; and

B. The Memphis Chapter shall within fifteen (15) days of the date of service of this order distribute a copy of this order to all persons who are employees, officers, directors, or members as of the date of service

of this order. Furthermore, within fifteen (15) days of the date that any person becomes an employee, officer, or director of the Memphis Chapter, its successors, or assigns, or any person or firm becomes a member of the Memphis Chapter, its successors, or assigns, the Memphis Chapter shall distribute a copy of this order to any such person or firm.

V.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in their corporate existences such as dissolution or the creation of successor corporations or any other change in the corporations that may affect compliance obligations arising out of the order, or at least thirty (30) days prior to the formation by or with the participation of any respondent of any other corporation or organization that conducts the business of a bid registration service.

VI.

It is further ordered, That respondents shall:

A. Within sixty (60) days after the date of service of this order, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order;

B. For a period of five (5) years after the date of service of this order, maintain and make available to the Federal Trade Commission staff for inspection and **[56]** copying, upon reasonable notice, records pertaining to any action taken in connection with any activity covered by Parts I, II, and III of this order, including written communications, and summaries of oral communications, to and from the respondents; and

C. In addition to the report required by Section VI(A) of this order, within one year after the date of service of this order, and annually for a period of five (5) years on or before the anniversary of the date of service of this order, and at such other times as the Commission may by written notice to the respondents require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the respondents have complied and are complying with this order.

Final Order

The Administrative Law Judge filed his Initial Decision in this matter on November 21, 1985, finding the corporate respondents Electrical Bid Registration Service of Memphis, Inc., and National Electrical Contractors Association, Memphis Chapter, Inc. to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in acts and practices as alleged in the complaint.

On December 11, 1985, the Respondents filed a notice of their intention to appeal the Initial Decision. That notice was withdrawn on January 10, 1986. Counsel Supporting the Complaint filed a notice of intention to appeal the Initial Decision on December 13, 1985, but withdrew their notice on January 8, 1986. [2]

The Commission has determined that the case should be placed on its own docket for review and that the Initial Decision, with the exception of Finding 56 and the associated discussion, should become effective as the decision of the Commission. Accordingly,

It is ordered, That the Initial Decision, except as noted above, and the order contained therein shall become effective on February 12, 1986.

Acting Chairman Calvani would not have placed this matter on the Commission's docket for review and would have allowed the Initial Decision in its entirety to become effective as provided in Section 3.51(a) of the Commission's Rules. The Commission having determined to take this procedural step, he concurs in the issuance of the order contained in the Initial Decision.

IN THE MATTER OF

HEALTH CARE MANAGEMENT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3182, Complaint, Feb. 20, 1986—Decision, Feb. 20, 1986

This consent order requires the Columbus, Ga. owner and operator of North Mobile Community Hospital near Mobile, Ala., and the hospital's medical staff, among other things, to cease imposing unlawful restrictions relating to the practice of podiatry at the hospital. The hospital and its staff are prohibited from imposing such restrictions by not enacting any bylaw or policy that would have the effect of: (1) coercing or intimidating any staff member not to co-admit podiatrists' patients; (2) requiring an amount of residency training for podiatrists that is not reasonably related to legitimate quality-of-care grounds; or (3) prohibiting podiatrists with hospital privileges from attending medical staff meetings.

Appearances

For the Commission: *Douglas B. Brown.*

For the respondents: *David W. Mernitz, Stark, Doninger, Mernitz & Smith,* Indianapolis, Ind.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondents have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1: Respondent Health Care Management Corporation is a for-profit corporation existing under the laws of the State of Georgia. North Mobile Community Hospital ("the Hospital") is a division of Health Care Management Corporation, operating a general acute care hospital in the Mobile, Alabama, metropolitan area. The principal physical facilities of the Hospital are located at Hartley and Baker Roads, Satsuma, Alabama. Health Care Management Corporation is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 2. Respondent Medical Staff of North Mobile Community Hospital ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Alabama, and is located at the Hospital. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at the Hospital.

PAR. 3: Most, if not all, of the members of the Medical Staff are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and with other health care providers in the Mobile metropolitan area.

PAR. 4: Membership on the Medical Staff provides important economic benefits to the individual members, and it allows a practitioner to admit and treat patients at the Hospital and provides the opportunity for other professional benefits to its members. The Medical Staff is organized for the profit of its members, is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 5: Physicians in the Mobile, Alabama, metropolitan area charge fees and collect payments for their services that, in substantial part, are paid directly or indirectly with Federal funds or funds received interstate from insurance companies and from other payers. The flow of said funds is affected by competition among physicians in the Mobile metropolitan area and by the acts and practices of the Medical Staff and its members as hereinafter alleged. Moreover, medical practitioners in the Mobile metropolitan area treat out-of-state patients, and the ability of a medical practitioner to obtain hospital privileges may influence his or her decision to move to and practice in the Mobile metropolitan area. These acts and practices are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6: On January 14, 1981, a podiatrist applied to the Hospital for certain surgical privileges within the scope of his Alabama podiatry license. The Hospital encouraged the Medical Staff to grant privileges to the podiatrist because the Hospital desired to increase its occupancy rate and the utilization of its facilities.

PAR. 7: On September 2, 1981, the Hospital granted that podiatrist certain podiatric surgical privileges on the condition that he co-admit his patients with a medical doctor, in conformance with the standards of the Joint Commission on the Accreditation of Hospitals then in effect. Soon after that date, the podiatrist began to co-admit patients with at least two members of the Medical Staff.

PAR. 8: In July, 1982, some members of the Medical Staff, who were

in competition with podiatrists, began a drive to prevent podiatrists from performing surgery at the Hospital. Thereafter, beginning at least as early as October, 1982, some members of the Medical Staff, the Medical Staff acting as a combination of its members, and the Hospital joined in a combination and conspiracy to pressure individual physicians not to co-admit patients with any podiatrist and to impose on the practice of podiatry within the Hospital unreasonable restrictions that are not reasonably related to legitimate quality of care grounds.

PAR. 9: In furtherance of the aforesaid combination and conspiracy to impose on the practice of podiatry within the Hospital unreasonable restrictions that are not reasonably related to legitimate quality of care grounds, the Medical Staff, some members of the Medical Staff, and the Hospital engaged in the following acts and practices, among others:

A. Some members of the Medical Staff pressured individual physicians not to co-admit patients with any podiatrist;

B. The Medical Staff imposed restrictions unreasonably limiting the practice of podiatry within the Hospital:

1. The Medical Staff imposed severe restrictions regarding the supervision of podiatrists by members of the Medical Staff. Those restrictions were not reasonably related to quality of care and had the effect of raising costs and limiting the practical ability of the podiatrists to use the Hospital's surgical facilities;

2. The Medical Staff required all podiatrists who sought surgical privileges to have completed a three-year approved residency. However, the Medical Staff had no knowledge concerning the relevancy of the training received in the second and third years of podiatric residency training to the specific procedures for which privileges were requested, and it had no objective basis to believe that the three-year residency requirement was reasonably necessary to ensure quality of care for the specific procedures that the podiatrists sought privileges to perform. The effect of a three-year residency requirement would be to exclude virtually every podiatrist in the United States from obtaining surgical privileges; and

3. The Medical Staff prohibited podiatrists from attending Medical Staff meetings; and

C. The Hospital approved or enforced these restrictions and thereby joined in the aforesaid combination and conspiracy.

PAR. 10: As a result of the aforesaid combination, conspiracy, and conduct, the only podiatrist who retained privileges could not admit and treat surgical patients at the Hospital because no member of the Medical Staff would co-admit patients with him. Other podiatrists

were denied privileges there because of the aforesaid combination, conspiracy, and conduct.

PAR. 11: The purposes or effects and the tendency and capacity of the combination, conspiracy, conduct, and practices described in Paragraphs Eight, Nine, and Ten are and have been to restrain trade unreasonably and hinder competition between medical doctors and podiatrists for the care of the foot in the Mobile metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Patients have been limited in their ability to choose among a variety of alternative types of health care providers competing on the basis of price, service, and quality;

B. Other hospitals may be deterred from granting reasonable surgical privileges to podiatrists; and

C. Podiatrists may be deterred from entering into practice in the Mobile area because of the lack of reasonable surgical privileges.

PAR. 12: The combination, conspiracy, and conduct described above constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination, conspiracy, and conduct are continuing and will continue absent the entry against respondents of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the execut-

ed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Health Care Management Corporation is a for-profit corporation existing under the laws of the State of Georgia. North Mobile Community Hospital is a division of Health Care Management Corporation, operating a general acute care hospital in the Mobile, Alabama, metropolitan area. The principal physical facilities of the Hospital are located at Hartley and Baker Roads, Satsuma, Alabama.

2. Respondent Medical Staff of North Mobile Community Hospital is an unincorporated association, organized and existing under the laws of the State of Alabama, and is located at North Mobile Community Hospital. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at the Hospital.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

I

For purposes of this order, the following definitions shall apply:

A. *Health Care Management Corporation* means the respondent, Health Care Management Corporation, a Georgia corporation, its officers, committees, representatives, directors, agents, employees, successors, and assigns.

B. *The Hospital* means North Mobile Community Hospital, a division of Health Care Management Corporation, its officers, committees, representatives, agents, employees, successors, and assigns. The Hospital is a general acute care hospital at Satsuma, Alabama. It does not include other hospitals owned or operated by Health Care Management Corporation that are not successors or assigns of North Mobile Community Hospital.

C. *The Medical Staff* means the respondent Medical Staff of North Mobile Community Hospital, its officers, committees, representatives, delegates, agents, employees, successors, and assigns. The Medical Staff is an unincorporated association of physicians and other practitioners who have been granted privileges by the Hospital to admit and attend patients at the Hospital.

D. *Corrective action* means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with clinical privileges at the Hospital who fails to provide evidence of malpractice insurance coverage or whose professional conduct or activities are detrimental to patient safety or to the delivery of quality patient care or are unreasonably disruptive to the operation of the Hospital.

II

It is ordered, That Health Care Management Corporation, in connection with the ownership and operation of the Hospital, shall cease and desist from, directly or indirectly or through any device, entering into, continuing, maintaining, adhering to, acquiescing in, or aiding and abetting any agreement, combination, or conspiracy to unreasonably restrict the practice of podiatry permitted under Alabama law, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to any agreement, combination, or conspiracy to:

A. Coerce or encourage any staff member not to co-admit a podiatrist's patient or otherwise associate professionally in the treatment of that patient with a podiatrist who is lawfully licensed in the State of Alabama and has been granted surgical privileges by the Hospital for the procedures for which the patient is admitted;

B. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice that requires an amount of residency training for podiatrists that is not reasonably related to legitimate quality of care grounds with regard to the specific surgical procedures for which privileges are requested;

C. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice relating to the practice of podiatry that is not reasonably related to legitimate quality of care grounds and that unreasonably restricts the practice of podiatry at the Hospital or unreasonably discriminates against podiatrists; or

D. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice that restricts any podiatrist who has been granted privileges by the Hospital from attending Medical Staff meetings.

III

It is further ordered, That the Medical Staff shall cease and desist from, directly or indirectly or through any device, in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, the following:

A. Coercing or encouraging any staff member not to co-admit a podiatrist's patient or otherwise associate professionally in the treatment of that patient with a podiatrist who is lawfully licensed in the State of Alabama and has surgical privileges at the Hospital for the procedures for which the patient is admitted;

B. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice that requires an amount of residency training for podiatrists that is not reasonably related to legitimate quality of care grounds with regard to the specific surgical procedures requested;

C. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice relating to the practice of podiatry that is not reasonably related to legitimate quality of care grounds and that unreasonably restricts the practice of podiatry or unreasonably discriminates against podiatrists; or

D. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice that restricts any podiatrist who has been granted privileges by the Hospital from attending Medical Staff meetings.

IV

It is provided, That this order shall not be construed to prohibit the Hospital or the Medical Staff or its members from engaging in credentialling, corrective action, utilization review, quality assurance, peer review, or hospital policy-making activities at the Hospital, where such conduct by the Hospital or the Medical Staff neither constitutes nor is part of any agreement, combination, or conspiracy whose purpose, effect, or likely effect is to impede unreasonably the practice of podiatry at the Hospital as permitted under Alabama law.

V

It is further provided, That nothing in this order shall require the Medical Staff or the Hospital to violate any Federal or State law.

VI

It is further ordered, That:

A. Within thirty (30) days after the date of service of this order, Health Care Management Corporation, in connection with its owner-

ship and operation of the Hospital, shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of the Hospital, and, for a period of five (5) years after that date, provide a copy of such order and complaint to each new officer or director of the Hospital within thirty (30) days after each new officer or director is appointed or elected;

B. Within thirty (30) days after the date of service of this order, the Medical Staff shall provide a copy of this order and of the complaint in this proceeding to each officer of the Medical Staff and to each member of the Medical Staff who was an officer or a member, respectively, on the date of service of this order and, for a period of five (5) years after that date, provide a copy of such order and complaint to each person who becomes a member of the Medical Staff at the time that the person is notified of his or her acceptance to the Medical Staff;

C. Within ninety (90) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order; and

D. In addition to the report required by Section VI(C), each respondent shall file, one (1) year after the date of service of this order and at such other times as the Commission or its staff may by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this order.

VII

It is further ordered, That within sixty (60) days after the date of service of this order, the Medical Staff and Health Care Management Corporation shall revise or change the respective restrictions, bylaws, rules, regulations, policies, and practices of the Medical Staff and the Hospital to conform with the provisions of this order and shall eliminate, modify, and change any restrictions, bylaws, rules, regulations, policies, or practices that unreasonably restrict the practice of podiatry at the Hospital. A copy of all such changes shall be included in the report required under Section VI (C) of this order.

VIII

It is further ordered, That each respondent notify the Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to such proposed change.

IN THE MATTER OF

RHODE ISLAND BOARD OF ACCOUNTANCY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9181. Complaint, July 10, 1984—Decision, Feb. 25, 1986

This consent order requires the Rhode Island Board of Accountancy, the sole licensing authority for CPAs and PAs in the state, among other things, to cease prohibiting accountants in the state from seeking business by truthful advertisments or other non-deceptive forms of solicitation. Respondent may continue to impose restrictions authorized by the state legislature against dishonest or fraudulent practices and against persons who falsely identify themselves as accountants.

Appearances

For the Commission: *Rendell A. Davis, Jr.*

For the respondent: *Linda Buffardi,* Providence, R.I. and *Christopher H. Little* and *Steven E. Snow, Tillinghast, Collins & Graham,* Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Rhode Island Board of Accountancy has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

(a) *Board* means the respondent named above, the Rhode Island Board of Accountancy;

(b) *Rhode Island* means the State of Rhode Island and Providence Plantations;

(c) *CPA* means certified public accountant;

(d) *PA* means public accountant; and

(e) *encroachment* means the endeavor of a CPA or PA to provide

services to persons or entities that are the clients of other CPAs or PAs.

II. RESPONDENT

2. The Board is organized, exists, and transacts business under the laws of Rhode Island (R.I. Gen. Laws § 5–3) with its principal office at 100 North Main Street, Providence, Rhode Island. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

3. Three of the five members of the Board are required by R.I. Gen. Laws § 5–3–4 to be in "active practice" in Rhode Island as CPAs and one member of the Board is required to be in "active practice" as a PA.

4. Compensation for serving on the Board for each Board member is limited to no more than thirty dollars ($30) per meeting of the Board and such compensation cannot exceed seven hundred fifty dollars ($750) per year for any one Board member.

5. The Board members are appointed by the Governor of Rhode Island.

6. The Board is the sole licensing authority of CPAs in Rhode Island. It administers written examinations and otherwise supervises the qualification, certification, and licensing of CPAs for practice within Rhode Island.

7. Upon payment of fees, the Board issues annual permits to practice to properly qualified CPAs and PAs.

8. It is unlawful for individuals to practice as CPAs or PAs in Rhode Island unless they hold permits to practice issued by the Board.

9. Pursuant to R.I. Gen. Laws § 5–3–4(f)(2), the Board may prescribe rules and regulations concerning professional conduct for CPAs and PAs in Rhode Island. The Board is authorized by R.I. Gen. Laws § 5–3–12(d) to take disciplinary action against any CPAs or PAs in Rhode Island who violate any of the Board's regulations concerning professional conduct.

III. STATE REGULATION OF ADVERTISING, SOLICITATION, AND ENCROACHMENT BY ACCOUNTANTS

10. Rhode Island has no articulated or expressed state policy of restricting truthful advertising or prohibiting solicitation or encroachment by CPAs and PAs. The laws of Rhode Island are silent as to the form of, or content of, the Board's rules and regulations concerning professional conduct, except for instructions that the Board may issue "[r]ules and regulations of professional conduct for establishing and maintaining high standards of competence and integrity in the profession of public accounting."

IV. BOARD CONDUCT

11. The Board has restrained competition among CPAs and PAs in Rhode Island by combining or conspiring with its members or others, or by acting as a combination of its members or others,

(a) to prohibit advertising and solicitation by CPAs and PAs in Rhode Island and

(b) to prevent Rhode Island CPAs and PAs from endeavoring to provide any services to persons or entities that are the clients of other CPAs or PAs, unless such clients request such services or unless the auditing of a subsidiary, branch, or other component of such clients is necessary to express an opinion on the combined or consolidated financial statements of the clients.

12. In furtherance of this combination or conspiracy, the Board has promulgated Regulations 4.1 and 5.2 of its Regulations Concerning Professional Conduct of Holders of a Certificate to Practice as a Certified Public Accountant or of an Authority to Practice as a Public Accountant. Appendix A, attached to this complaint, sets forth the text of those regulations.

V. TRADE AND COMMERCE

13. Except to the extent that competition has been restrained as alleged below, and depending on their specialties and geographic location, CPAs and PAs in Rhode Island compete with each other and with the accountants serving on the Board.

14. Millions of dollars are spent each year on the services of the hundreds of CPAs and PAs practicing in Rhode Island.

15. The services provided by Rhode Island CPAs and PAs involve and affect individuals, corporations, and other business entities throughout the United States. Those services facilitate, direct, and shape the conduct of interstate business and contribute to the flow of persons, money, goods, and services into and out of Rhode Island. In the course of rendering services, many CPAs and PAs located in Rhode Island travel to states other than Rhode Island and make substantial use of interstate mail and telephone services in the transport of funds, financial statements, and other communications. Some Rhode Island CPAs are in partnership with CPAs practicing in states other than Rhode Island. The acts and practices described below are in interstate commerce, or affect the interstate activities of CPAs and PAs in Rhode Island and of persons who pay for their services, and are in or affecting commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

VI. EFFECTS

16. The effects of the combination or conspiracy described above are and have been to restrain competition and injure consumers in the following ways, among others:

(a) competition in the sale of the services of CPAs and PAs has been unreasonably restricted;
(b) consumers of the services of CPAs and PAs have been deprived of information as to such services and of the benefits of free and open competition in the sale of such services; and
(c) CPAs and PAs have been unreasonably restrained in their ability to make their services readily and fully known and available to consumers requiring such services.

VII. VIOLATION

17. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy, or the effects thereof, are continuing and will continue or reoccur unless the Commission enters appropriate relief against the Board.

APPENDIX A

Excerpts from the "Regulations Concerning Professional Conduct of Holders of a Certificate to Practice as a Certified Public Accountant or of an Authority to Practice As a Public Accountant" promulgated by the Board:

4.1 Encroachment: A Certified Public Accountant or Public Accountant shall not endeavor to provide a person or entity with a professional service which is currently provided by another Certified Public Accountant or Public Accountant except:

1. He may respond to a request for a proposal to render services and may furnish service to those who request it. However, if an audit client of another Certified Public Accountant or Public Accountant requests a different Certified Public Accountant or Public Accountant to provide professional advice on accounting or auditing matters in connection with an expression of opinion on financial statements, the accountant to whom the request has been made must first consult with the accountant currently engaged to ascertain that the accountant is aware of all the available relevant facts.
2. Where a Certified Public Accountant or Public Accountant is required to express an opinion on combined or consolidated financial statements which include a subsidiary, branch or other component audited by another independent Public Accountant, he may insist on auditing any such component which in his judgment is necessary to warrant the expression of his opinion.

A Certified Public Accountant or Public Accountant who receives an engagement for services by referral from another Certified Public Accountant or Public Accountant shall not accept the client's request to extend his service beyond the specific engagement without first notifying the referring accountant, nor shall he seek to obtain any additional engagement from the client.

* * * * * * *

5.2 Solicitation and Advertising: A Certified Public Accountant or Public Accountant shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of jurisdictional facts, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Rhode Island Board of Accountancy is organized, exists, and does business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its office and principal place of business located at 100 North Main Street, Providence, Rhode Island.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For purposes of this order, the following definitions shall apply:

A. *Board* means the Rhode Island Board of Accountancy, its mem-

bers, committees, representatives, agents, employees, successors, and assigns.

B. *Person* means any natural person, corporation, partnership, governmental entity, association, organization, or other entity.

C. *Encroachment* means the endeavor of a person to provide services to the client of another person.

D. *Reasonably believes* refers only to that which a reasonable person would believe after having considered all relevant facts and legal precedent.

E. *Accountancy License* means any certificate, authority, registration, permit, or license issued by the Board, including, but not limited to,

1. a certificate of certified public accountant,
2. the authority to practice as a public accountant,
3. registration as an accountant licensed by a foreign country,
4. a permit to practice as a certified public accountant or public accountant, and
5. a limited permit to engage in the practice of accounting.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any device:

A. Prohibiting, restricting, impeding, or discouraging any advertising, solicitation, or encroachment by any person. Such conduct includes, but is not limited to:

1. Adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits, restricts, impedes, or discourages any advertising, solicitation, or encroachment;
2. Taking or threatening to take disciplinary action against any person for advertising, soliciting, or encroaching; and
3. Declaring any practice of advertising, solicitation, or encroachment to be illegal, unethical, unprofessional, or otherwise improper.

B. Inducing, urging, assisting, or encouraging any person to take any action prohibited by this Part.

Provided, that nothing in this order shall prevent the Board from taking any action authorized by Chapter 5–3 of the General Laws of Rhode Island against those advertising, solicitation, or encroachment practices that respondent reasonably believes are dishonest or fraudulent within the meaning of Section 5–3–12(b) of those Laws, or

that respondent reasonably believes are unlawful under Section 5–3–16 of those Laws, as those statutes are limited by the First and Fourteenth Amendments to the United States Constitution.

III.

It is further ordered, That this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the profession of accountancy.

IV.

It is further ordered, That the Board shall:

A. Distribute by first-class mail an announcement in the form shown in Appendix A, and a copy of this order:

1. Within thirty (30) days after this order becomes final, to each person who, at the time this order becomes final, has an Accountancy License;
2. Within thirty (30) days after this order becomes final, to each person who, at the time this order becomes final, has an application for, or a request for reinstatement of, an Accountancy License pending before the Board; and
3. For a period of five (5) years after this order becomes final, to each person who applies for an Accountancy License, within thirty (30) days after he or she applies for such a license;

B. Within ninety (90) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order;

C. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including any written communications and any summaries of oral communications, and any records of rulemaking and enforcement proceedings, regarding advertising, solicitation, or encroachment;

D. In addition to the report required by Section IV.B. of this order, annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, and at such other times as the Commission may by written notice to the Board require, file a written report with the Federal Trade Commission setting forth in

detail the manner and form in which the Board has complied and is complying with this order; and

E. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the profession of accountancy that may affect compliance obligations arising out of this order.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Rhode Island Board of Accountancy has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit, restrict, impede, or discourage any

(1) advertising,
(2) solicitation, or
(3) endeavor of a person to provide services to the client of another person, a practice also known as "encroachment."

However, the order does not prevent the Board from prohibiting those advertising, solicitation, or encroachment practices that violate statutory prohibitions against dishonesty and fraud.

In particular, this means that as long as you do not engage in dishonesty or fraud, neither the Board nor any member of the Board can prevent or discourage you from engaging in the following practices: (a) in-person solicitation, (b) self-laudatory advertising, (c) comparative advertising, (d) endorsement or testimonial advertising, and (e) advertising that would have violated previously-imposed standards or rules, such as rules requiring that accountant advertising be "dignified" or "professional."

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

_____

Chairman
Rhode Island Board of Accountancy

IN THE MATTER OF

UNITED STATES STEEL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 760. Order, July 21, 1924—Modifying Order, March 10, 1986

The Federal Trade Commission has modified a 1924 order (8 F.T.C. 1) issued against respondent by deleting a requirement that the company include specific price and transportation information on its contracts and invoices.

ORDER REOPENING AND MODIFYING ORDER ISSUED ON JULY 21, 1924

On November 7, 1985, respondent United States Steel Corporation ("USS") filed its "Request to Reopen and Set Aside in Part and Modify in Part the Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding in Docket No. 760 and to modify the order issued by the Commission in this case on July 21, 1924, by deleting Paragraph 3, which requires USS to state clearly on its contracts and invoices how much is charged for the steel f.o.b. the producing or shipping point and how much, if any, is charged for the actual transportation. USS also asks that the order be modified to specify that, "Quotations and sales may be made on a net delivered price basis so long as there is no concerted refusal to quote or sell rolled steel products f.o.b. the plant where the products are manufactured or from which they are shipped." USS' request was placed on the public record for thirty days; no comments were received.

After reviewing USS' request and other available information, the Commission has concluded that the public interest warrants reopening and modification of the order to eliminate Paragraph 3. The requirement that price and transportation information be included on USS' contracts and invoices for rolled steel products was adopted principally as a fencing-in restraint ancillary to the order's prohibitions against the use of the "Pittsburgh Plus" or other basing point pricing system and against price discrimination. USS has shown that since the deregulation of railroad freight rates by the Staggers Rail Act of 1980, 49 U.S.C. 10701 *et seq.*, enacted by Congress to promote competition by allowing carriers to negotiate confidential contract rates with their customers, many carriers have insisted that USS not disclose their negotiated rates. This change in the legal framework within which carriers and USS now operate, and the carriers' insist-

ence upon confidentiality within that new framework, represents a changed condition of fact warranting elimination of the order's requirement that the actual freight charge appear on contracts and invoices between USS and its customers. Disclosure of USS' rates in its invoices allows USS' competitors to discover any favorable terms which it has negotiated with carriers and would reduce the incentive of a rail carrier to offer USS a favorable rate. Elimination of Paragraph 3 is therefore in the public interest because it will enable USS to compete effectively for contract rates.

The disclosure requirements of Paragraph 3 appear to have served their remedial purpose. There is no indication that USS has used the "Pittsburgh Plus" or other basing point system of pricing or engaged in price discrimination of the type contemplated by the order since July 21, 1924. Nothing in the record suggests that the requirements of Paragraph 3 are now needed to ensure that basing point pricing or price discrimination are not reinstituted by USS.

With respect to the remainder of the Request, which asks that the order be modified to specify that, "Quotations and sales may be made on a net delivered price basis so long as there is no concerted refusal to quote or sell rolled steel products f.o.b. the plant where the products are manufactured or from which they are shipped," such modification is not necessary. Once Paragraph 3 is deleted, the remaining provisions of the order do not restrict USS' ability to quote or sell on a net delivered price basis. Rather, these provisions only ban quoting or selling of rolled steel products at "Pittsburgh Plus" prices, which the order defines as adding to the price of products shipped from points outside Pittsburgh amounts equal to the freight if the products had been shipped from Pittsburgh, or upon any other basing point. Net delivered pricing would not, therefore, be precluded so long as there was no charge for fictitious freight.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that Paragraph 3 of the order be, and it hereby is, deleted.

IN THE MATTER OF

BASS BROTHERS ENTERPRISES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9178. Complaint, May 8, 1984—Decision, March 12, 1986

This consent order requires, among other things, that Ashland Oil Co., the nation's third-largest producer of carbon black, cancel the proposed sale of its carbon black assets to Bass Brothers Enterprises, Inc. Ashland is also required to obtain Commission approval before selling any of its domestic carbon black plants to a major competitor.

Appearances

For the Commission: *Steven B. Feirman* and *Edward F. Glynn, Jr.*

For the respondents: *Kathleen E. McDermott* and *Thomas L. Feazell,* in-house counsel, Russell, Ky., for respondent Ashland Oil Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bass Brothers Enterprises, Inc. ("Bass Brothers") and Sid Richardson Carbon & Gasoline Co. ("Sid Richardson") intend to acquire the assets located in the United States of the Carbon Black Division of Ashland Chemical Company, a division of Ashland Oil, Inc. (collectively "Ashland"), in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. BASS BROTHERS ENTERPRISES, INC. AND SID RICHARDSON CARBON & GASOLINE CO.

1. Respondent Bass Brothers Enterprises, Inc. is a corporation organized and existing under the laws of the State of Texas with its corporate headquarters at 2700 First City Bank Tower, 201 Main Street, Fort Worth, Texas.

2. Respondent Sid Richardson Carbon & Gasoline Co. is a corporation organized and existing under the laws of the State of Texas with

its corporate headquarters at 2700 First City Bank Tower, 201 Main Street, Fort Worth, Texas.

II. ASHLAND OIL, INC.

3. Respondent Ashland Oil, Inc. is a corporation organized and existing under the laws of the state of Kentucky with its corporate headquarters at 1000 Ashland Drive, Russell, Kentucky.

III. JURISDICTION

4. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12), and Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

IV. THE PROPOSED ACQUISITION

5. On November 15, 1983, Bass Brothers entered into an agreement to acquire substantially all of the material operating assets in the United States of Ashland's Carbon Black Division. Bass Brothers is also acquiring a one-year option to purchase an irrevocable exclusive license to use Ashland's new energy-efficient reactor technology for manufacturing carbon black in the United States. After the proposed acquisition, the Ashland carbon black operations will be integrated with those of Sid Richardson.

V. TRADE AND COMMERCE

6. The relevant product market in which to assess the competitive effects of the acquisition is the market for carbon black.

7. The relevant geographic market in which to assess the competitive effects of the acquisition is the United States.

8. The relevant market is highly concentrated.

9. Barriers to entry into the production and distribution of the relevant product are substantial.

10. Both Sid Richardson and Ashland are substantial competitors in the relevant product and geographic markets.

VI. EFFECTS OF THE PROPOSED ACQUISITION

11. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in the following:

(a) Eliminate substantial actual competition between Sid Richardson and Ashland in the relevant market;

(b) Eliminate Ashland as a substantial competitor in the relevant market;

(c) Substantially increase concentration in an already highly concentrated market, therefore increasing the likelihood of collusion;

(d) Encourage additional mergers or acquisitions in the relevant market, thereby further increasing the likelihood of collusion;

(e) Tend to reduce the degree of price competition in the relevant market;

(f) Tend to reduce the volume of production of carbon black below competitive levels; and

(g) Tend to reduce actual competition among other companies engaged in the production and distribution of the relevant product.

VII. VIOLATIONS CHARGED

12. The proposed acquisition constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

Decision and Order

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of

its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Ashland Oil, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its corporate headquarters at 1000 Ashland Drive, Russell, Kentucky.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the purposes of this order the following definitions shall apply:

Carbon black means furnace-process and thermal-process carbon black, whether used for rubber or other applications.

Ashland means Ashland Oil, Inc., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

Bass Brothers means Bass Brothers Enterprises, Inc., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

SRCG means Sid Richardson Carbon & Gasoline Co., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

Production capacity means the practical annual productive capacity of all units, including units currently in operation and units that could be put into operation with or without time delay or additional investment.

I.

It is ordered, That, unless Ashland has already done so, it will, not later than fourteen (14) days after this order becomes final, terminate any agreement that provides for or contemplates the acquisition of Ashland's carbon black business by Bass Brothers or Sid Richardson, including but not limited to the letter of intent signed on or about November 15, 1983, return or destroy all documents containing or recording confidential information provided to Ashland by Bass Brothers or SRCG, and recover from Bass Brothers and SRCG all documents containing or recording confidential information provided to Bass Brothers and SRCG by Ashland, in connection with acquisi-

tion negotiations or agreements. Nothing herein contained shall relieve Ashland from any obligation of confidentiality imposed by agreement among Bass Brothers, SRCG and Ashland.

II.

It is further ordered, That for a period of four (4) years from the date on which the Agreement consenting to the issuance of this order is signed, Ashland shall not sell, transfer, or divest, either directly or indirectly, any carbon black manufacturing plant in the United States to any person engaged in the production of carbon black in the United States, unless Ashland has filed the notification set out in Section III of this order and the waiting period set out in Section III of this order has expired. *Provided, however,* That such sale, transfer, or divestiture shall not be subject to this Section II: (1) if the sale, transfer, or divestiture is of a single plant, and the acquiring firm's share of carbon black production capacity in the United States in the most recent calendar year preceding the transaction is no greater than fifteen percent; or (2) if notification of the transaction is required to be made, and in fact is made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

III.

It is further ordered, That the notification required of Ashland by Section II of this order shall be made to the Director of the Bureau of Competition of the Federal Trade Commission, shall refer to this order, and shall include such information and be in such form as is required of the acquired person for notification of an acquisition made pursuant to Section 7A of the Clayton Act and any rules promulgated thereunder. After filing such notification, Ashland shall observe the provisions and requirements of Paragraphs (a), (b), and (e) of Section 7A of the Clayton Act, 15 U.S.C. 18a, and any rules promulgated thereunder, that relate to prohibition of an acquisition prior to expiration of the waiting period, granting of requests for early termination, extension of waiting period, submission of additional information or documentary material, and other governmental action or information requests, that are in effect at the time the notification is filed, which provisions and requirements are incorporated herein by reference. *Provided,* That no party other than Ashland must file notification under this Section III, and the duration of the waiting period shall not be affected by the failure of any party other than Ashland to submit documents or information if requested.

IV.

It is further ordered, That notification and other documents required to be filed by Ashland with the Director of the Bureau of Competition by Sections II and III of this order shall not be deemed "compliance reports" within the meaning of Rule 4.9 of the Commission's Rules of Practice, 16 C.F.R. 4.9.

V.

It is further ordered, That Ashland shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That if, prior to the expiration of this order, the Commission dismisses the complaint against Bass Brothers and SRCG without an order, this order shall be terminated by the Commission upon application by Ashland.

VII.

It is further ordered, That Ashland shall, within thirty (30) days after making any sale, transfer, or divestiture of any carbon black manufacturing plant in the United States that is not subject to notification under Section II of this order, file with the Commission a written report describing such transaction.

VIII.

It is further ordered, That Ashland shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

MASSACHUSETTS FURNITURE AND PIANO MOVERS ASSOCIATION, INC.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9137. Final Order, Sept. 28, 1983—Dismissal Order, March 19, 1986

ORDER OF DISMISSAL

The Commission has determined that the continued prosecution of this case is no longer in the public interest. Accordingly,

It is ordered, That the complaint be and hereby is dismissed.

Commissioner Strenio did not participate.

IN THE MATTER OF

AMERICAN MEDICAL INTERNATIONAL, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9158. Final Order, July 2, 1984—Modifying Order, March 21, 1986

The Federal Trade Commission has modified, for the second time, a 1984 divestiture order with American Medical International, Inc. (104 F.T.C. 1). After first modifying the original order specifing the divestiture required (104 F.T.C. 617 (1984)), the Commission has further modified the order to allow respondent to divest French Hospital in San Luis Obispo, Calif., to Summit Health Ltd. The current modified order allows respondent to retain a security interest in French Hospital until Summit finishes payment, and retain the stock of French Hospital Corp.

ORDER MODIFYING MODIFIED ORDER TO CEASE AND DESIST

On November 9, 1984, the Commission issued its modified order in this matter requiring, *inter alia,* that respondent American Medical International, Inc. ("AMI") "divest, absolutely and in good faith, all stock, assets, properties, licenses, leases, and other rights and privileges, tangible and intangible, that AMI acquired from Central Coast Hospital Company, French Hospital Corporation and French Medical Clinic, Inc., together with any subsequent improvements." Pursuant to the terms of Paragraph II of the order, AMI submitted an application requesting prior Commission approval of AMI's divestiture of French Hospital Corporation to Summit Health Ltd. ("Summit"). The application was placed on the public record for thirty days in accordance with Section 2.41 of the Commission's Rules of Practice, and no public comments were received.

Although the proposed divestiture appeared consistent with the order's express objective of "establish[ing] French Hospital as a viable competitor in San Luis Obispo County", the agreement entered into between AMI and Summit varied from the provisions of Paragraph II of the order in certain respects. Specifically, the agreement granted AMI a security interest in the assets to be divested and an accompanying right to repossess the assets. In addition, the agreement did not provide for the transfer of the stock of French Hospital Corporation or of the data processing equipment installed by AMI at the hospital. Because it appeared that the public interest would be served by modifying the order to allow the proposed divestiture to go forward, on March 6, 1986, the Commission issued its Order To Show Cause Why Order Requiring Divestiture Should Not Be Modified ("order to show

cause") pursuant to Section 3.72 of the Commission's Rules of Practice. The order to show cause proposed modification of Paragraph II of the order to allow AMI to retain a security interest in the assets to be divested, to require redivestiture of any assets AMI reacquires by operation of such a security interest, to delete the requirement that AMI divest the stock of French Hospital Corporation and to exclude from the assets to be divested the data processing equipment installed by AMI at French Hospital. On March 11, 1986, the order to show cause was served on AMI, and AMI answered on March 12, 1986, stating that it consents to the modifications.

After reviewing AMI's answer and the materials submitted in connection with AMI's divestiture application, the Commission has concluded that the public interest warrants modifying the order as proposed in the order to show cause. As the Commission observed in the order to show cause, the proposed divestiture appears likely to advance the remedial objectives of the order.

Accordingly,

It is hereby ordered, That pursuant to 15 U.S.C. 45(b), and Section 3.72 of the Commission's Rules of Practice, 16 C.F.R. 3.72, Paragraph II of the order in this matter be modified to read as follows:

It is ordered, That within twelve (12) months from the date this order becomes final, AMI shall divest, absolutely and in good faith, all assets, properties, licenses, leases, and other rights and privileges, tangible and intangible, that AMI acquired from Central Coast Hospital Company, French Hospital Corporation and French Medical Clinic, Inc., together with any subsequent improvements except for the stock of French Hospital Corporation and the data processing equipment installed by AMI at French Hospital. The purpose of the divestiture is to reestablish French Hospital as a viable competitor in San Luis Obispo County. The divestiture shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, AMI shall take all measures necessary to maintain French Hospital in its present condition and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested so as not to impair French Hospital's present operating abilities or market value.

Nothing in this order shall be deemed to prohibit an eligible person from giving and AMI from accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security interest on all or any portion of the assets to be divested under the provisions of this order. If AMI accepts a security interest, in no event should such security interest be interpreted to mean that AMI has a right to participate in the operation or management of such assets. In the event that AMI,

as a result of the enforcement or settlement of any bona fide lien, mortgage, deed of trust or other form of security interest, reacquires any of the aforementioned assets, then AMI shall promptly notify the Commission in writing and shall divest the reacquired assets in accordance with the terms of this order within twelve (12) months of the reacquisition.

Commissioner Strenio did not participate.

IN THE MATTER OF

FIGGIE INTERNATIONAL, INC.

FINAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9166. Complaint, May 17, 1983—Final Order, April, 11, 1986

This final order requires, among other things, a Richmond, Va. manufacturer and seller of home heat detectors to provide notification that smoke detectors give earlier warning than heat detectors in nearly all residential fires to past purchasers of its heat detectors. Respondent must also disclose that fact in any future promotional materials that make claims about the residential fire protection provided by heat detectors. Additionally, respondent is prohibited from misrepresenting: (1) the performance characteristics of any heat or smoke detector, or any system containing both; or (2) any standard or recommendation established by the National Fire Protection Association or any other group concerning fire warning systems.

Appearances

For the Commission: *Christopher Schwartz* and *David M. Malone.*

For the respondent: *Edwin S. Rockefeller* and *Leslie Donovan, Schiff, Hardin & Waite,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Figgie International, Inc., a corporation ("respondent") has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent, Figgie International, Inc., is an Ohio corporation with its principal place of business at 1000 Virginia Center Parkway, Richmond, Virginia.

PAR. 2. Respondent maintains a substantial course of business, including the acts and practices set forth hereinafter, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent manufactures, advertises, offers for sale, sells and distributes residential fire alarm products including heat detectors and smoke detectors. Respondent's fire alarm products are some-

times identified by the trade name "Vanguard" and are sold to the public by respondent's distributors through in-home sales presentations. Respondent offers these products as fit for the purpose of affording fire warning protection to residential occupants.

PAR. 4. In order to sell its fire alarm products respondent has made numerous representations in various promotional and training materials it prepared and disseminated. Illustrative of respondent's representations are the following:

(1) Heat detectors "will give immediate early warning."
(2) Heat detectors provide "fast response to hot fires." [2]
(3) Smoke detectors provide only "partial protection."
(4) "Mechanical heat detectors are essential to provide the reliability that smoke detectors lack and to guard against the many types of fires where smoke detectors may be ineffective."
(5) "The 'VANGUARD' Thermosonic 50–Ft. Heat Detector and the 'VANGUARD' Smokesonic Smoke Detector will provide the combination needed to give a greater measure of life safety."

PAR. 5. Through the use of these representations, and others of similar meaning, and by offering its fire alarm products as fit for the purpose of affording fire warning protection to residential occupants, respondent represents, directly or by implication, that:

(1) In the event of fire, respondent's heat detectors provide sufficient warning to occupants to allow them to escape safely.
(2) Respondent's fire alarm systems combining heat detectors and smoke detectors provide significantly greater fire warning protection for occupants than smoke detectors alone.

PAR. 6. In truth and in fact:

(1) In nearly all residential fires, life endangering conditions will occur prior to the activation of respondent's heat detectors. Such heat detectors, therefore, do not provide sufficient warning to occupants in the event of fire.
(2) Respondent's fire alarm systems combining heat detectors and smoke detectors do not provide significantly greater fire warning protection for occupants than smoke detectors alone.

Therefore, the statements and representations set forth in Paragraphs Four and Five were and are deceptive and unfair.

PAR. 7. Respondent's use of the aforesaid deceptive and unfair statements and representations has had and now has the capacity and tendency to deceive consumers and to induce purchases of substantial quantities of respondent's products. [3]

PAR. 8. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted,

and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Initial Decision by

Montgomery K. Hyun, Administrative Law Judge

October 23, 1984

Preliminary Statement

On May 17, 1983, the Federal Trade Commission ("Commission") issued an administrative complaint charging Figgie International, Inc. ("Figgie") with a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), in connection with certain product claims allegedly made by Figgie in the distribution and sale of heat detectors. On July 1, 1983, Figgie filed an answer denying that it violated the Federal Trade Commission Act as charged. On November 8, 1983, Paragraphs 5 and 6 of the complaint were amended so as to change several words. The amended complaint alleged generally that promotional materials supplied to and used by Figgie distributors during in-home sales presentations contain express and implied effectiveness claims for Vanguard heat detectors which are deceptive and unfair. More specifically, the amended complaint challenges the lawfulness of alleged product claims (1) that in the event of most fires Vanguard heat detectors provide the necessary warning to allow a safe escape in residential fires and (2) that Vanguard fire alarm system combining heat detectors and [2] smoke detectors provide significantly greater fire warning protection than smoke detectors alone.

Evidentiary hearings for the presentation of complaint counsel's case-in-chief began on April 30, 1984 and ended on May 9, 1984. Defense hearings began on June 13, 1984 and ended on June 20, 1984. Sixteen witnesses gave testimony. The transcript of hearings, including prehearing conferences, consists of some 1,700 pages and about 86 exhibits, including a number of slides and tapes, were received in evidence. The evidentiary record was closed on July 6, 1984.[1]

The proposed findings and conclusions submitted by the parties and their arguments in support thereof have been given careful consideration by me and to the extent not adopted by this Initial Decision, in the form proposed or in substance, are rejected as not supported by

[1] By order of September 18, 1984, the Commission extended the due date of this initial decision to October 23, 1984.

the evidence or as immaterial. Any motion appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this Initial Decision are hereby denied.

Upon consideration of the entire record in this proceeding and having considered the demeanor of the witnesses, I make the following findings of fact and conclusions of law and order based on the record considered as a whole:[2] [3]

Findings of Fact

I. JURISDICTION

1. Respondent Figgie International, Inc. ("Figgie") is a corporation organized and doing business under the laws of Ohio, located at 1000 Virginia Center Parkway, Richmond, Virginia (Ans. of Figgie, ¶ 1).

2. Figgie is now and has been engaged in the distribution, promotion, offering for sale and sale of heat and smoke detectors under the trade name "Vanguard" (CX 135, Respondent's Response to Complaint Counsel's Request for Admission No. 2).

3. Figgie, through its Interstate Engineering Division (hereinafter sometimes referred to as "Figgie-Interstate"), ships goods, including but not limited to Vanguard heat detectors and smoke detector; through interstate commerce (CX 135, Admission No. 6).

4. The Interstate Engineering Division of Figgie had total sales of about $29,939,000 for the period January 1, 1981 through May 31, 1983 (CX 135, Admission No. 5).

5. Figgie-Interstate had total sales of about $23,212,000 for the period January 1, 1979 through December 31, 1980 (CX 125).

6. In the course and conduct of its business, Figgie-Interstate has produced and disseminated promotional material through the United States mails pertaining to Vanguard smoke and heat detectors for the purpose of promoting the sale of Vanguard fire alarms (CX 135, Admission No. 8).

7. In the course and conduct of its business, and at all times relevant to the Complaint, Figgie-Interstate has maintained a substantial

[2] For the purposes of this initial decision, the following abbreviations were used:

F. – Finding of Fact in this decision
CPF – Complaint Counsel's Proposed Findings
RPF – Respondent's Proposed Findings
CR – Complaint Counsel's Reply
RR – Respondent's Reply
Tr. – Transcript of hearings, sometimes preceded by the name of the witness
CX – Complaint Counsel's exhibit
RX – Respondent's exhibit
Comp. – Complaint
Ans. – Answer

course of trade in these products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (CX 135, Admission No. 10).

II. BUSINESS OF RESPONDENT

A. *Company History*

8. Figgie was known as A-T-O, Inc., until the name was changed in 1981 (Schoettler 1259). The name change did not signify any change in Figgie-Interstate's method of doing business (Schoettler 1259; McGee 602; Sterner 1575). [4]

9. Figgie is a diversified international operating company with 30 major divisions marketing industrial, consumer and technical products. Some of Figgie's better known products include American La-France fire apparatus and Rawlings sports equipment (CX 62B). Figgie claims to be the "World's Largest Integrated Manufacturer of Fire Protection and Security Equipment." Annual sales are in excess of $700 million (CX 62B).

10. Interstate Engineering was at one time an independent corporation headquartered in California. In 1959, Interstate introduced the first Vanguard heat detector. In November 1967, Interstate merged into A-T-O and it is now an operating division of Figgie (CX 64L).

B. *Fire Alarm Products Offered For Sale*

11. Figgie-Interstate is now and has been, at all times relevant to the complaint, engaged in the manufacture of fixed-temperature heat detectors which are sold for the purpose of providing fire warning protection to residential occupants (CX 135, Admission Nos. 1 and 12).

12. Figgie-Interstate, at all times relevant to the complaint, has purchased the smoke detectors it sells from outside manufacturers (Sterner 1620).

13. Since 1971, Figgie-Interstate has offered for sale and sold Vanguard heat detectors containing either a 136° or a 175° fuse (Sterner 1614). An improved, 117° fuse was first offered for sale in April 1982 (CX 94A; Sterner 1614). In August 1983, the 117° fuse became the standard fuse used in a Vanguard heat detector (Sterner 1615).

14. Figgie-Interstate also offers for sale and sells both A.C.-D.C. photoelectric smoke detectors and battery operated ionization smoke detectors (CX's 93, 71Z–11). The photoelectric smoke detector currently sold by Figgie-Interstate is designed to activate once smoke density reaches approximately 1.5% (CX 64W).

C. *Marketing Of Heat And Smoke Detectors*

15. Figgie-Interstate offers for sale and sells Vanguard heat and smoke detectors to distributors located nationwide (CX 135, Admission No. 7; McGee 604) who in turn sell the products through in-home sales presentations to consumers (McGee 609; Hammack 231). Figgie-Interstate has a contractual relationship with these distributors (McGee 645).

16. Between January 1, 1981 and May 31, 1983, Figgie-Interstate has generated about $2,354,000 in heat detector [5] sales. For the same time period, Figgie-Interstate has generated about $620,000 in smoke detector sales (CX 127).

17. The standard package of heat and smoke detectors sent by Figgie-Interstate to distributors contains either five heat detectors and one smoke detector or six heat detectors alone (Schoettler 1269).

18. Sales figures from January 1, 1979 to May 31, 1983 indicate that Figgie-Interstate sells between four and five heat detectors for every smoke detector sold (CX's 127A, 125). Interstate currently sells both the 136° and 117° heat detector to distributors for $32.75. Interstate charges distributors $46.00 per unit for the smoke detectors (CX 127B). The testimony of Vanguard fire alarm purchasers called as respondent's witnesses indicate that they paid about $100 per detector (Gwinn 1483; Hodja 1514) and have bought about five heat detectors for every one smoke detector (Hartley 1477; Shaw 1556; Hodja 1506; Gwinn 1477; Losito 1464).

19. Figgie-Interstate, in the regular course of its business, receives and maintains owner registration cards from distributors indicating the name and address of the purchaser, the number of Vanguard alarms installed, the purchase date and the name of the distributor responsible for the sale (CX 79; Hammack 2591).

20. Figgie-Interstate prepares, produces, and supplies promotional materials for use by its distributors during in-home sales presentations (CX 136, Amended Answer to Requested Admission No. 9; McGee 626–27, 632, 644; Hammack 212, 214, 218, 247, 250, 252). These materials contain detailed elements of the sales presentations to be made to consumers (Hammack 215; McGee 626).

21. Figgie-International, in the course and conduct of its business, and at all times relevant to the complaint, has exercised substantial control over the promotional practices of its distributors regarding the sale of Vanguard heat and smoke detectors, including the content of the sales presentation.

22. Until 1981, Interstate had relied upon a hierarchy of distributors referred to as divisional, regional and factory-direct. Divisional distributors had the largest sales territories and oversaw the activi-

ties of regional distributors. In turn, regional distributors were responsible for the factory-direct distributors operating within their respective regions. Figgie-Interstate paid a commission to divisional and regional distributors based on the purchase volume of those distributors for whom they were responsible (McGee 604–05, 608). Factory-direct distributors frequently establish subdistributors whom they supply (Hammack 206). [6]

23. During 1981, Interstate made all existing distributors factory-direct distributors. This change was prompted by Interstate's decision that divisional and regional distributors were not "giving them enough help" (McGee 608).

24. All factory-direct distributors, appointed by Figgie-Interstate, are assigned a primary area of responsibility as stipulated in a written agreement with Figgie-Interstate (Schoettler 1268; McGee 603). Figgie-Interstate also establishes sales quotas for those areas of primary responsibility (Schoettler 1268; CX's 85, 135, Admission No. 16).

25. Figgie-Interstate maintains a substantial role in the training of its distributors. It is recommended to all distributors that they rely upon the two-volume training manuals (CX's 64–65) for detailed information relating to hiring and training of their salesmen, and for sales presentations including scripts for opening and closing the sales presentation, lead generation and product information (Schoettler 1259; Sterner 1655). To date, Figgie-Interstate has sold about 5,000 copies of CX's 64 and 65 to its distributors (Interrogatory No. 34).

26. Figgie-Interstate holds regular sales meetings for Vanguard distributors where they are instructed by Figgie-Interstate personnel about sales presentations, lead generation and recruiting of sales people (CX's 87, 91–92, 96–97, 9P, 99–100).

27. Figgie-Interstate personnel regularly travel to various regions of the country to instruct distributors on how to stimulate sales and to show them how to do a proper sales presentation (Sterner 1656; CX 135, Admission No. 42; McGee 611). Distributors are further monitored by regular telephone calls from Interstate's Vice President for Marketing and its National Sales Director (Sterner 1660; CX 135, Admission No. 71).

28. Prior to November 1979, Interstate hired consultants, often known as National Trainers, to visit various distributorships and instruct them on such matters as day-to-day operation of the business, marketing of products and product information (CX 135, Admission No. 63; McGee 610).

29. On occasion, Figgie-Interstate instructs its distributors to memorize scripts prepared by Interstate for use in sales presentations (CX's 64Z–13, 88; Sterner 1655).

30. On occasion, distributors and Interstate personnel work to-

gether to develop new promotional material including the script for the slide presentation released by Figgie-Interstate in January 1983 (CX 135, Admission No. 59).

31. In order to stimulate sales, Figgie-Interstate sponsors sales contests among distributors and establishes award programs (CX 135, Admission Nos. 44 and 74). Figgie-Interstate has [7] provided funds to pay some of distributors' costs for advertisements recruiting salespersons (CX 89, 135, Admission No. 77).

32. In the course and conduct of its business, and at all times relevant to the complaint, Figgie-Interstate has produced and disseminated promotional materials which constitute a major portion of the sales presentation made by Vanguard distributors to consumers (Hammack 215; McGee 626).

33. Most of the promotional materials prepared, produced and distributed by Figgie-Interstate contain performance claims relating to Vanguard heat detectors (CX 136, Amended Response to Requested Admission No. 11; CX's 61C, G, 63, 66, 67M-N, P, S, 68B, 69C-D, 70B, E, G, 71Z–10, Z–12).

34. A method nationally employed by Vanguard distributors and recommended by Figgie-Interstate for purposes of generating sales leads included the offer of a free fire extinguisher to consumers who had filled out a registration card giving his or her name and address. The cards were deposited into drop boxes located in retail outlets and at trade fairs and were subsequently used by local Vanguard distributors to schedule sales presentations (CX 64Z–20; Hammack 228; Hodja 1504).

III. FIGGIE-INTERSTATE'S SALES PRESENTATION AND PROMOTION OF VANGUARD FIRE ALARM DEVICES

35. The sales presentation consists largely of promotional materials supplied to distributors by Figgie-Interstate. These in-home presentation materials include slide shows, testimonial letters, brochures and booklets, demonstration materials, government fire study excerpts and other materials, all intended to drive home the real danger of home fires and to induce the consumer to purchase Vanguard heat detectors, often in a system including a token number of smoke detectors. Figgie-Interstate recommends that heat detectors be installed in every room, including living rooms, bedrooms, kitchens, dens, basements, attics and garages; and perhaps a smoke detector outside the sleeping areas (CX 66M, 135, Admission No. 27; Sterner 1620).

A. *The Slide Presentation*

36. An important element of the sales presentation is a slide presentation with a synchronized audio tape, entitled "Home Safety Pro-

gram," which is prepared and disseminated by Figgie-Interstate. There have been two editions of the slide show. The first, CX 131 (CX 129, audio tape for old slide show; CX 130, transcript of CX 129), was in use from 1980 until early 1983. The second, CX 133 (CX 132, audio tape for new slide show; a [8] transcript of CX 132 appears on Tr. 1586–1604), has been in use since January 1983 (CX 135, Admission No. 59; Hammack 234; McGee 640, 644). Interstate's Vice President of Marketing, Irv Sterner, is of the opinion that the new slide presentation produced by Figgie-Interstate is the most effective piece of promotional material provided to Vanguard distributors for use during in-home sales presentations (CX 135, Admission No. 50).

37. According to Sterner, the new slide presentation (CX 133) is "totally different" from the old slide show (CX 131). Dr. Cohen, complaint counsel's expert witness, viewed both versions and characterized them as very similar in content and impact (Cohen 305–08). The evidence shows that the number of slides were reduced from 100 in the old version to 90 in the new, 64 of the old 100 slides were removed together with corresponding audio and, of the remaining 36 slides the accompanying audio was changed in many of them (Sterner 1573–74). The administrative law judge had occasion to view both versions and came away with a distinct impression that both versions conveyed a similar message regarding the real danger of night-time fires in homes and the effectiveness of Vanguard heat detectors as early warning devices, which have saved many lives.

38. The slide shows vividly depict residential fires, homes engulfed in raging flames and choking smoke and show alarming fire statistics regarding the real danger of night-time residential fires. In one fearful fire scene after another, the viewer is shown what a reliable fire warning device like Vanguard heat detector can do to save lives and property in residential fire situations.

39. The audio portion of the new slide show (CX 133) contains the following express representations:

a. The information you are about to hear may mean the difference between life and death for your family. So listen more carefully than you have ever listened before (Tr. 1587).

b. The purpose of our visit is to tell you how fires start, how they spread and, most important, how to survive (Tr. 1588).

c. Authorities say there are two things necessary to save you and your family in case of fire. "The first is adequate warning" (Tr. 1590).

d. When your fire occurs, it could be at night, the real danger time for your family. The vast majority of fire fatalities occur between the hours of 11:00 p.m. and 6:00 a.m. when most people are sleeping. Not more fires, more fire deaths (Tr. 1594). [9]

e. The most feared [toxic by-product of fire is] carbon monoxide. The gas is produced in abundance in every fire. It is odorless, colorless, and tasteless. A very short exposure

to this gas will not only induce sleep, but render you unconscious and, finally, death (sic; Tr. 1596).

f. However, regardless of the physical cause of fire fatalities, the real killer is time. If every family were warned of the fire in time, nighttime fire deaths and injuries could be virtually eliminated (Tr. 1598).

g. Under normal conditions with the bedroom door open a family had just 1.8 minutes from the time a fire started until it was too late. Even closing the bedroom door only gave them 5.6 minutes (Tr. 1598).

h. Imagine if an early warning system existed for your car that could warn you minutes before a fatal crash. We would all want one. A system like that of course does not exist. Yet, an early warning system does exist that will warn you minutes before a fatal fire condition exists in your home (Tr. 1599).

40. The audio portion of the old slide show (CX 130) contains the following express representations:

a. A few months ago we had a serious fire in our home that resulted in a financial loss and a much greater loss, the life of our nine year old son. We had one smoke detector and a false sense of security. The fire we had was so hot that by the time the smoke detector sounded it was too late. We now realize that to have adequate protection the home must have heat detectors as well as smoke detector (CX 130C).

b. We suggest that you watch the film and draw your own conclusions as to whether you want the protection provided by a cheap smoke detector or the protection offered by a combination system (CX 130C).

c. As the oxygen content in the air is burned up and the carbon monoxide increases your senses are gradually dulled so that you sleep more soundly. This is one of the main causes of residential fire fatalities (CX 130D). [10]

d. They die because the fire is not discovered in time for them to get out (CX 130E).

e. Vanguard can give you that extra measure of life safety when the fire starts (CX 130F).

f. We know we had made the right decision as we heard the life saving sound of the heat detector which warned us of an overheated furnace. Without this protection the result could have been a tragedy (CX 130F).

g. Tests show that you may have as little as 1.8 minutes to escape with your life (CX 130G).

h. We have all ready [sic] saved thousands of lives and million of dollars in property (CX 130M).

i. Numerous fire authorities recommend the Vanguard system (CX 130M).

j. Chief Joe Armstrong of the Andover Fire Department, Chief Boyd Tuttle, Columbia Fire Department and Chief Ray Gergeler, Eagleville Fire Department witness the activation of the first alarm only 15 seconds after the start of the fire in a demonstration house fire. The heat detector located on the ceiling at the top of the adjoining room activated only five seconds after the first detector. The third heat detector located on the ceiling at the top of the stairwell activated four seconds later. It took nearly 33 seconds for the smoke detector to activate (CX 130M).

k. Automobile accidents kill thousands of people each year just as fire does. If you could get a device that you could put on your car to let you know two or three minutes before you have a wreck to allow everyone to get safely out of the car, would you want one? Certainly you would. Everybody knows there is no such device for cars but there is for fire. That is exactly what Vanguard is (CX 130N).

B. *Promotional Brochures And Booklets*

41. CX 61, entitled *Disneyland Hotel is a Pioneer in Life Safety* (*Disneyland Hotel*) is a 8–page promotional piece copyrighted by Interstate Engineering in 1981, 1982 and 1983. The cover page bears, in addition to the title, a large [11] photograph of the Disneyland Hotel. During the in-home sales presentation, Vanguard distributors make CX 61 available to prospective purchasers (Hammack 247; McGee 638). Interstate produces and distributes CX 61 and has sold about 14,000 copies to its distributors (CX 61, Interrogatory No. 34). Irv Sterner, Interstate's Vice President of Marketing, is of the opinion that CX 61 is the third most effective pieces of Vanguard heat detector promotional literature (CX 135, Admission No. 51).

42. CX 61, *Disneyland Hotel,* purports to report the results of an activation test of 175 Vanguard heat detectors that had been in use in the Disneyland Hotel in Anaheim, California, since January 1960. The test was conducted at Interstate's facilities on October 16, 1980 (CX 61C).

43. According to CX 61, in this first-time-anywhere, large-scale "dependability test" of mechanical heat detectors, all of the 175 Vanguard heat detectors, each of which had remained at its installation site without service for as long as 20 years, "responded within the designated temperature range by sounding a loud alarm lasting four and five minutes."

44. CX 61C also contains the following statements:

> This proof of long-term dependability did not surprise the manufacturer. VANGUARD heat detectors came into existence in 1959 and since then Interstate Engineering has received over one thousand letters evidencing the saving of thousands of lives through the use of millions of VANGUARD heat detectors.
>
> The VANGUARD heat detectors used in the activation had been installed in the two-story garden style guest rooms of the Disneyland Hotel in January, 1960 and since VANGUARD heat detectors do not require maintenance, each remained at its installation site without service. The Disneyland Hotel estimates that, since the heat detectors were installed, 4,343,255 people have stayed in rooms having VANGUARD heat detectors. Because the heat detectors performed so well, the Disneyland Hotel installed the latest model of the VANGUARD Thermosonic Heat Detector (as well as a smoke detector) in each room already having a VANGUARD heat detector when those rooms were remodeled.
>
> Interstate Engineering also markets VANGUARD smoke detector alarms, fire escape ladders and fire extinguishers. [12]

45. CX 61C, which is followed by three pages of photographs, bears a notation printed in bold types, at the bottom of the page, which reads:

IMPORTANT

The presence of representatives from the Disneyland Hotel, the Los Angeles County Fire Department and the Orange County Fire Department in no way represents an endorsement of the items tested.

The United States Government, fire authorities, Interstate Engineering (a Figgie International Company), and VANGUARD distributors strongly recommend the installation of an adequate number of early fire warning detection devices.

46. The following page, CX 61D, shows two photographs. The top half of the page shows a large number of heat detectors arranged on a long table. Standing behind the table is a small group of men. The legend to the left of this photograph reads: "Participating in the test were IEC personnel and Captain Richard Schiehl, (third from right) Los Angeles County Fire Department and Fenton Hill, (second from right) Disneyland Hotel." The bottom half shows a partial view of a table bearing several rows of heat detectors and two uniformed officers, standing behind the table, and one examining a detector held in his hands. The legend to the left of this photograph reads: "(l-r) Captain Richard Schiehl, Los Angeles County Fire Department and Captain Charles Pister, Orange County Fire Department timing the four to five minute alarm cycle."

47. CX 61E shows two photographs. The top half of the page shows a man, standing by a table bearing a number of heat detectors, examining a detector held in his hands. Standing next to the man is a uniformed officer holding a notepad in one hand and looking at the detector hand-held by the other man. The legend to the right of the picture reads: "Captain Charles Pister, Orange County Fire Department and Fenton Hill, Disneyland Hotel observing the condition of the VANGUARD heat detectors prior to the test." The bottom half of the page shows a long display table bearing rows of heat detectors and a man holding a hair-dryer like apparatus over a heat detector. Opposite him across the table stands a uniformed officer looking on and picking up a heat detector. The legend to the right reads: "(l-r) John Kelly, IEC director of consumer relations activating VANGUARD heat detectors while Captain Richard Schiehl of the Los Angeles County Fire Department checks the gauge type thermometer in order to note the temperature at which the activation occurs." [13]

48. CX 61G contains the following statement:

New VANGUARD heat detector alarms were recently installed in the Garden Villas at The Disneyland Hotel.

Features that made early models of the VANGUARD heat detector so reliable have been maintained while some outstanding improvements have been made. VANGUARD'S latest innovations over the heat detectors formerly in use at the Disneyland Hotel include:

- A doubling of the sensitivity range
- Increased escape time due to a faster response time
- The decibel level of the alarm has been raised
- The duration of the alarm sound has been increased
- The state of fail-safe readiness is assured because the heat detector cannot be fused unless the alarm is fully powered.

The Disneyland Hotel now has the benefit of all these improvements in their heat detectors, and in addition smoke detectors have also been installed.

49. The top half of the last page, CX 61H, shows a large photograph of a five heat detector/one smoke detector configuration. The legend which appears below the photograph reads:

VANGUARD Thermostatic Heat Detector Alarms and VANGUARD Smokesonic Smoke Detector Alarm

50. CX 63 is a one-page promotional piece styled as a red-letter news release bulletin directed to Interstate distributors, issued in July 1978, and features quotations attributed to a U.S. National Bureau of Standards official. The headline quotation reads: "HEAT DETECTORS HAVE PROBABLY SAVED MORE LIVES AND [14] PROPERTY THAN ANY OTHER FIRE DETECTION DEVICE." The narrative portion of this "news release bulletin" prints two quotations purportedly taken from a speech by Richard W. Bukowski, U.S. Bureau of Standards, Center for Fire Research, given at the National Fire Protection Association (NFPA) Annual Meeting in Anaheim, California. The bulletin then states:

We are pleased to see the U.S. National Bureau of Standards recognize these important facts. Those of you who have been protecting families with Vanguard know from first-hand experience how true these National Bureau of Standards statements are. They exactly summarize the position Vanguard has taken in recommending "combination systems" through the years.

It means the **only** way to provide complete and sure fire-warning protection is by using both smoke detectors and heat detectors, by using completely non-electrical devices in addition to the electrical devices and by combining long-lived reliability with timely response.

If one is **not** going to have a fire, it is a total waste of money to install even one detector. But, if one **is** going to have a fire, he had better have complete and sure fire-warning protection. At the present state-of-the-art, there is no other way to accomplish this except with a "combination" system of smoke detectors guarding the approaches to the bedrooms and mechanically-powered heat detectors in the other major rooms.

51. During the sales presentation, Vanguard distributors make CX 63 available to prospective purchasers (Hammack 247). Interstate prepares and distributes CX 63 (CX's 63, 77B).

52. CX 67, entitled *The Purpose of My Visit* is a promotional piece used by Vanguard distributors and made available to consumers during in-home sales presentations and contains materials copyrighted between 1973 and 1980 (CX 67; McGee 628). CX 80 is an updated version of CX 67 (McGee 631) and contains similar material with a few changes. Figgie-Interstate prepares and produces CX 67 and CX 80 and has sold about 4,200 copies to date (CX 136, Interrogatory No. 34).

53. CX 67 and CX 80 contain the following express representations: [15]

a. The cover page announces the purpose of a salesman's visit to be (CX's 67A, 80A):

> To present your family vital life saving information on home fire safety.
>
> To give information on what to do in the event a fire strikes your home.
>
> To show you outstanding products that could benefit you and your family for many years.

b. CX 67D and CX 80E are identical and headlined "Fire Can Happen To You" and state:

> Of the nearly 1 million building fires that occurred in 1971, almost seven out of ten occurred in residential occupancies. The chances are that the average family will experience one fire every generation serious enough to have the fire department respond. Residential fires account for about half of all fire deaths and a third of all property losses. (If the losses from non-building fires are excluded, residential fires account for about 87 percent of the deaths and 39 percent of these property losses.)

The right-half of the page is devoted to a graphic percentage comparison of life losses, property losses and number of fires between residential and non-residential fires.

c. CX 67G and CX 80H are identical and headlined "Night Time Is The Danger Time" and feature the following message:

> The large percentage of multiple death fires occur between the hours of 11 p.m. and 6 a.m. when most people are asleep. . . .

d. CX 67I and CX 80J are identical and headlined "The National Commission Reports 'HOW TO DIE IN A FIRE' " and lists asphyxiation, attack by superheated air or gases, smoke, toxic products [16] and flames, and concludes "The Real Killer Is Time."

e. CX 67L and CX 80L are identical and headlined "There Is a Solution." These pages then show "recommendations" of the Report of the National Commission on Fire Prevention and Control. One excerpted paragraph reads in part:

The National Fire Protection Association, the Department of Housing and Urban Development, and the International Association of Fire Chiefs, among others, support the use of early warning detectors in homes. . . . At a minimum, most advocates feel, there should be an early-warning detector on the ceiling near each sleeping area in the house. Some believe a system of heat detectors is an adequate substitute, but only if there are many more of them located throughout the house. . . . The Commission urges Americans to protect themselves and their families by installing approved early-warning fire detectors and alarms in their homes.

f. CX 67M and CX 80M are identical and purport to present a "Life Safety Plan" recommended by Interstate. The recommended plan consists of:

- Home fire safety education
- Fire escape plan (operation EDITH)
- Home inspections for fire hazards
- An Early Warning System to detect hot fires and smoldering fires in the very early stages.

g. CX 67N and CX 80N contain similar material and both prominently feature a photograph of a Vanguard heat detector. In CX 80N, the textual material is printed below a headline "UNEQUALED RELIABILITY" and reads as follows: [17]

- Limited 25–year warranty
- Self-contained—no wires or batteries
- High sound warning level
- Multiple temperature rating
  117°—70 ft. space rating
  136°—50 ft. space rating
  175°—50 ft. space rating
- Sealed and permanently lubricated
- Protected against corrosion
- Listed by "UL" of U.S.A., "ULC" of Canada and California State Fire Marshall
- Endorsements by many fire authorities
- Over one thousand testimonial letters from thankful Vanguard owners
- Over four million Interstate alarms installed
- A confirmed leader in residential fire detection
- Quality engineering

h. CX 67O and CX 80P both prominently feature a photograph of Vanguard Smokesonic 8–22 AC-DC smoke detector but each employs a slightly different format. CX 80P characterizes the photo electric smoke detector as "the ultimate in SAFETY, QUALITY and DESIGN," and then the product features as follows:

- Two Power Sources for 24 hour protection
- Space age technology
- LED light source (Estimated 40 year life)

- Utilizes solid state components [18]
- Will not alarm to gases or to aerosols other than smoke
- Transformer reduces voltage within detector to a safe 9 volts
- Will not false alarm to high air flows
- Fast response to a slow smoldering fire
- Minimum maintenance required
- U.L. listed

i. CX 67P and CX 80Q are identical and are headlined "TYPES OF FIRE PROTECTION—THE CHOICE IS YOURS!" The left half of the page purports to compare the various features of available devices and appears to suggest the best way is a Vanguard mechanical heat detector/smoke detector combination system. The right half of the page is devoted to a photographic presentation of what appears to be a five heat detector/one smoke detector "Vanguard Combination System." This photograph (CX 67Q and CX 80Q) of a five heat detector/one smoke detector comfiguration appears to be identical to the full-page photograph on CX 71Z–13, another Interstate promotional piece, discussed hereinafter.

j. CX 67Q is headlined "A Basic Early Warning System for the Average Home" and purports to illustrate, using a vertical diagram (house plan) and a horizontal floor plan, recommended locations where heat detectors and smoke detectors may be installed. The vertical diagram shows one smoke detector in the upper level bedroom and one smoke detector in the top of a stairwell between two lower level bedrooms. The floor plan diagram shows one heat detector in the kitchen, one heat detector in each of the three bedrooms, one heat detector in the utility room, one heat detector in the living room (making up six heat detectors in all) and one smoke detector in the central hallway. The textual material [19] appearing to the left of the diagrams reads:

> While full protection calls for adequate heat and smoke detectors in all rooms and in all other enclosed areas where fire can occur, such a system is not always economically possible for the homeowner.
>
> One of the most important factors to consider in a home fire alarm system installation is the location, type, and number of the fire detecting devices.
>
> While it is logical to assume that partial protection can provide some degree of life safety, it should be the goal of every family to protect themselves to the very best of their ability with adequate heat and smoke detection devices.

This page (CX 67Q) was evidently deleted from the updated version, CX 80.

54. CX 68, copyrighted in 1980, is a promotional brochure entitled *Are Smoke Detectors Really Enough Protection From Fire?* CX 68 is

used by Vanguard distributors to generate sales leads (McGee 632; Hammack 249). It is prepared and disseminated by Figgie-Interstate and about 2,500 copies have been sold to distributors (Interrogatory No. 34).

55. CX 68B and C appear to answer the question "are smoke detectors really enough protection from fire?" in the negative, by pointing out, in bold types, that "SMOKE MAY NOT REACH THE DETECTOR," "SMOKE DETECTORS ONLY RESPOND TO CERTAIN TYPES OF FIRES," "ELECTRONIC DEVICES ARE SUBJECT TO MALFUNCTION," "POWER SOURCES MAY FAIL," and "SMOKE DETECTORS CAN FAIL WITHOUT NOTICE." The above material is followed by a statement:

Smoke detectors save lives and Vanguard smoke detectors are of the best quality. Yet, people who have depended only on smoke detectors as an early warning device have been injured and died as a result of fire. It is possible that some of the victims may have experienced a false sense of security previous to their fire. [20]

To the lower right of the above-quoted statement appears the following statement printed in a boxed frame:

NO VANGUARD OWNER HAS EVER DIED IN A FIRE AS A RESULT OF A VANGUARD MECHANICAL HEAT DETECTOR PRODUCT FAILURE. NO SMOKE DETECTOR CAN MATCH VANGUARD'S LONG TERM RECORD OF DEPENDABILITY (CX 68C).

To the left of the above boxed statement appears the following statement:

A BETTER WAY

Mechanical heat detectors are essential to provide the reliability that smoke detectors lack and to guard against the many types of fires where smoke detectors may be ineffective. VANGUARD distributors support the approach expressed by a top expert in the United States National Bureau of Standards Center for Fire Research. That is: The systematic combination of various types of detectors to maximize chances of fire survival.

VANGUARD has received well over a thousand letters and fire reports from families who might not be alive today if it had not been for VANGUARD mechanical heat detectors. These testimonials clearly indicate that a carefully planned system that includes an adequate number of mechanical heat detectors is a sensible and proven method (CX 68B).

56. CX 69, copyrighted in 1981 and 1983 by Interstate, is a promotional brochure entitled *If You're Serious About Fire Protection, Install Vanguard, The Reliable Combined Fire Protection System.* Figgie-Interstate prepares and distributes CX 69 to Vanguard dis-

tributors, who in turn use it during in-home sales presentations (Hammack 250; McGee 638). To date, Interstate has sold 6,000 copies of CX 69 to distributors (Interrogatory No. 34).

a. CX 69A prominently features the now familiar photograph of a five heat detector/one smoke detector combination, [21] which also appeared in CX 71Z–13, CX 67P and CX 80Q, discussed hereinabove.

b. CX 69C contains the following statements:

NFPA 74 was revised in 1974. It incorporated in the NFPA Standard the four levels of protection. These depict the importance of incorporating the concept of reliable heat detectors with an approved smoke detector as a part of the complete system.

1975 - The National Fire Prevention and Control Administration published Highlights of the National Household Fire Survey. It showed the danger areas where solutions must be found.

We feel a practical solution would be to give early warning in areas where most fires start.

Below the above statements appears a graphic presentation showing where household fires start, including such locations as kitchens, bedrooms, basements and bathrooms. A statement printed below the graph reads: "Kitchen fires involving cooking constitute 40% of all household fires. Non-cooking kitchen fires account for another 25% of the total."

The material printed in the right column of CX 69C includes the following statements:

Due to high fire incidents in these areas, there must be provided U.L. approved type heat detectors which will give immediate early warning. The **"VANGUARD"** 50–FT. rated heat detector will provide reliable, service-free, long-lasting protection in these critical fire areas.

* * * * * * *

The **"VANGUARD"** Thermosonic 50–FT. Heat Detector and the **"VANGUARD"** Smokesonic Smoke Detector will provide the combination needed to give a greater measure of life safety. This [22] system, when properly installed per the recommendations set forth in the latest edition of NFPA 74, constitutes the finest system on the market today!

c. CX 69D refers to "NFPA Standard No. 74" and gives the Fire Equipment Manufacturers' Association "recommendations":

Since 1967, the National Fire Protection Association Standard No. 74 has required fire detection equipment to warn against fire in the home. The Fire Equipment Manufacturers' Association, Inc. (FEMA) endorses this requirement in general. . . .

Because of the infinite number of variables involved, and because of differences in judgment as to what constitutes "adequate" protection, this question may not be precisely answered. However, general guidelines have been established by FEMA.

The Fire Equipment Manufacturers' Association, Inc. (FEMA) recommends:

1. That one smoke detector be installed to guard each separate sleeping area. (A "separate sleeping area" comprises the hallway and all the bedrooms opening onto that hallway.)
2. That both smoke detectors and self-contained, mechanically powered heat detectors be used in every household fire warning system and that neither type ever be used alone.

* * * * * * *

Every fire warning system for homes should include both heat detectors and smoke detectors, properly applied, and located in accordance with their best usage. [**23**]

57. CX 70, entitled *Highlights of Over One Thousand Vanguard Activations in Real Fire Situations,* is a promotional brochure copyrighted by Interstate in 1981 and 1983. It purports to present in chart form "pertinent information" based on some "1,107 letters about Vanguard residential fire alarms in real fire situations which occurred between 1959 and 1980" (CX 70A-B). The express statements and graphic presentations contained in CX 70 include the following:

a. In the interest of the life safety of those who depend only on smoke detectors as an early warning device, we feel that the following information as revealed in this brochure should be especially noted:

734 of the reported fires were due to heating, cooking and electrical fires. (Chart A). The figures suggest that these types of fires might be responded to best by heat detectors.

569 of the reported fires started in kitchens, furnance [sic] rooms, garages or attics (Chart B). The National Fire Protection Association publishes, "NFPA No. 74–1980 Standard for the Installation, Maintenance, and Use of Household Fire Warning Equipment" which states, "The installation of smoke detectors in kitchens, attics (finished or unfinished), or in garages is not normally recommended as these locations occasionally experience conditions which may result in improper operation" (CX 70B).

b. We are glad to know that VANGUARD heat detectors installed during the past twenty years, and even earlier, are still protecting people today. We estimate that the number of people VANGUARD has warned of a fire situation could be as much as ten times higher than our testimonial letters indicate. This belief is based on the fact that in 1980 alone we had more than 2,000 requests for replacement fuses for VANGUARD heat detectors. In most instances, when a fuse needs to be replaced, it is usually because a fire [**24**] has occured [sic] and the fuse has activated (CX 70B).

c. Therefore, on the basis of the information in this brochure, we are confident you will agree with Interstate—that for maximum life safety—the VANGUARD combination system of heat and smoke detectors should be in every home. **We think deaths, injuries and property losses related to home fires would decrease dramatically if everyone followed the guidelines in the booklet, "NFPA No. 74–1980 Standard for the Installation, Maintenance, and Use of Household Fire Warning Equip-**

ment." The latest edition of this booklet can be purchased at nominal cost from the National Fire Protection Association, Batterymarch Park, Boston, Massachusetts 02269 (CX 70B).

d. CX 70G prominently features in the center of the page a photograph of five heat detector/one smoke detector configuration under a headline caption across the top of the page, which reads:

IF YOU'RE SERIOUS ABOUT FIRE PROTECTION INSTALL VANGUARD THE RELIABLE COMBINED FIRE DETECTION SYSTEM

CX 70G format is identical to CX 69A. Similar photographs of five heat detector/one smoke detector combination also appear in CX 61H, CX 67P, CX 71Z–13 and CX 80Q.

58. CX 71 is a 42–page booklet used by Vanguard distributors in their sales presentations to consumers. CX 71, copyrighted in 1981, is produced and distributed by Figgie-Interstate (CX 71; Hammack 240; McGee 634). CX 71 was first made available in March of 1982; approximately 100 have been sold to distributors since that date (Hammack 210; Interrogatory No. 34).

59. CX 71 purports to present "the home fire problem," drawing upon authoritative sources of information, and advises what can be done about it by the use of Vanguard heat detectors and smoke detectors. The source of information is given as: (1) National Fire Protection Association ("NFPA"); (2) U.S. Government sources; (3) Leading fire authorities; and (4) documented incidents (CX 71D). Most of the textual material is printed over photographic montages and paintings depicting [**25**] leaping flames, a sleeping woman, burning appliances and stairways and a toy-strewn nursery engulfed in flames.

60. CX 71 contains many express representations in textual matter. The following are illustrative:

a. Night Time Is The Danger Time
The large percentage of multiple death fires occur between the hours of 11 p.m. and 6 p.m. when most people are asleep. . . . (CX 71S).

b. SECONDS CAN COUNT
Once on the loose, within a minute after, a fire can reach 1000 F.
The time span of 2 to 4 minutes, from first flames to deadly conditions is not unusual (CX 71U).

c. IN A HOME FIRE
Bedrooms some distance from the fire can become death traps in 2 minutes.
Two minutes is just about the length of time you would need to rouse your children and get them out of the house. Source: NFPA Bulletin FR 72–2 (CX 71V).

d. The Commission [National Commission on Fire Prevention and Control] urges Americans to protect themselves and their families by installing approved early warning fire detectors and alarms in their homes (CX 71Z–6).

e. EXPERTS AGREE

The Ideal Residential Fire Detection System Must Meet These Requirements:

One: Sensitivity
Two: Self Contained
Three: Portable
Four: Lifetime of Protection

(CX 71Z–8).

f. CX 71Z–9 is devoted to a large photograph of a heat detector, identified on the top as "Vanguard Thermosonic Heat Detector." Next follows a full-page of textual material, printed in large, bold types, which reads: [26]

UNEQUALED RELIABILITY

- Limited 25–year warranty
- Self-contained—no wires or batteries
- High sound warning level
- Multiple temperature rating
  117°—70 ft. space rating
  136°—50 ft. space rating
  175°—50 ft. space rating
- Sealed and permanently lubricated
- Protected against corrosion
- Listed by "UL" of U.S.A., "ULC" of Canada and California State Fire Marshall
- Endorsements by many fire authorities
- Over one thousand testimonial letters from thankful Vanguard owners
- Over four million Interstate alarms installed
- The confirmed leader in residential fire detection
- Quality engineering

g. CX 71Z–10 is devoted to a large photograph of a VANGUARD Smokesonic, designated as 8–22 A.C.-D.C. This page is followed by a full-page textual matter which reads:

Photo Electric Smoke Detector

The ultimate in SAFETY, QUALITY, and DESIGN.

- Two Power Sources for 24 hour protection
- Space age technology [27]
- LED light source (Estimated 40 year life)
- Utilizes solid state components
- Will not alarm to gases or to aerosols other than smoke
- Transformer reduces voltage within detector to a safe 9 volts
- Will not false alarm to high air flows
- Fast response to a slow smoldering fire
- Minimum maintenance required
- U.L. listed (CX 71Z–11).

h. CX 71Z–12 purports to compare different types of fire protection

devices, including sprinkler system, electrical heat detectors, battery-operated heat detectors, ionization-battery-operated smoke detectors, photoelectric 110 volt smoke detectors, mechanical heat detectors, and photoelectric LED/AC-DC smoke detectors, and suggests "the best way" to be "The Vanguard Combination system" of mechanical heat detectors and photoelectric LED/AC-DC smoke detectors. The textual matter for the combination system reads:

THE BEST WAY
The Vanguard Combination System

Mechanical
- Portable
- No maintenance
- No false alarms
- 25 year warranty
- Inexpensive long term cost
- Fast response to hot fires
- Millions installed
- Thousands of lives saved

Photoelectric
L.E.D./A.C.-D.C.
- No false alarms
- Two power sources for 24 hour protection
- Can be installed in most locations
- Light emitting diode has an estimated 40 year life
- Transformer reduces voltage to a safe nine volts
- Energy efficient
- Fastest response to slow smoldering fires [28]

i. The above presentation is followed by a full-page photograph showing a five heat detector/one smoke detector configuration of the combination system, under the caption "THE CHOICE IS YOURS!" (CX 71Z–13).

61. At the conclusion of each sales presentation, Vanguard distributors also use testimonial letters provided to them by Figgie-Interstate in order to persuade the prospective purchaser (CX's 72, 76; Hammack 253; Sterner 1660, 1667).

C. *The Cardboard House Demonstration* (CX 81)

62. During the sales presentation, Vanguard distributors perform a demonstration of how a Vanguard heat detector works. This demonstration involves placing a lit candle inside a cardboard house (CX 81), a piece of tissue serving as the roof of the house, and the heat detector is placed directly on top of the tissue. Within seconds the heat detector alarm is activated while the tissue remains unscorched. Interstate recommends that its distributors perform this demonstration and provides them with the cardboard house and a script that they are told to memorize. Interstate first offered the demonstration house in May 1981. To date, 1,900 have been sold to Vanguard distributors (Interrogatory No. 34; CX 88A, C; Hammack 240, 246).

D. *The Warranty Book* (CX 66)

63. CX 66, entitled *Safe at Home,* is a 23–page warranty book which, at the conclusion of a successful in-home presentation and sale, is left with a Vanguard heat detector purchaser. It contains Interstate's "fire replacement guarantee" and "limited 25 year warranty," together with various product information regarding Vanguard heat detectors and their installation (CX 66; Hammack 249; McGee 639). Interstate prepares and distributes CX 66 for use by Vanguard distributors. Some 650,000 copies of CX 66 have been sold to distributors (Interrogatory No. 34). CX 66 also contains useful information explaining how to conduct a home fire drill and family member instruction (CX 66S-U), planning fire escape plan (CX 66V) and a convenient "home fire safety check list" (CX 66W). CX 66 also contains the following statements:

a. "Vanguard" is skillfully engineered for highly reliable performance, and you have made a wise decision in selecting this equipment to help protect your loved ones. **[29]**

Fire can strike in countless ways, and there is no way to guarantee against injury or loss in a fire. "Vanguard," together with your Escape Plan and Fire Drills, is intended to help reduce the risk of injury or tragedy!

This booklet is designed to acquaint you with "Vanguard," the reasons for its development, and the Company behind the product. It will suggest sound methods to protect yourself and your family against the dangers of fire and what to do when fire strikes. Never forget that the one who can do the most to protect your family from fire is you! (CX 66E).

b. Interstate developed the "Vanguard Thermosonic" Alarm to help reduce the increasing loss of life and injuries from fire. A reliable, non-electric, non-battery heat detector was needed to warn of danger when fire occurred. Since the greatest loss of life occurs in the home, the "Vanguard Thermosonic" was designed specifically for the home (CX 66F).

c. There are two extremes of fire to which household fire warning equipment must respond. One is the rapidly developing, high heat fire. The other is the slow, smoldering fire. Either can produce smoke and toxic gases. The "Vanguard Thermosonic" Heat Detector is designed to detect abnormally high temperatures. The "Vanguard Smokesonic" Smoke Detector is designed to detect abnormal quantities of smoke. Every fire warning system for homes should include both heat detectors and smoke detectors, properly applied, and located in accordance with their best usage (CX 66F).

d. CX 66M is devoted to a section entitled "LOCATION AND QUANTITY OF HEAT DETECTORS AND SMOKE DETECTORS" and discusses NFPA Standard 74–1980. The textual material includes a lengthy quotation of NFPA Standard Section 2–1.1.1. Below the quotation appears the following: **[30]**

CAUTION:

The smoke detector(s) required by Section 2–1 of the NFPA 74 Standard will provide only partial protection. While it is logical to assume that the required partial protection

can provide a degree of life safety, it should be the goal of every family to provide themselves with the highest level of protection economically possible. You should consider the life safety involved and the level of protection best suited to you and your family's needs.

Additional heat detectors are recommended in the following areas: kitchens, living rooms (dens, family rooms, studies, recreation rooms, etc.), furnace rooms, basements, bathrooms and storage or porch areas, garages, laundry rooms and attics (CX 66M).

CX 66 also contain the following statements:

e. "Vanguard" Heat Detectors at the proper temperature rating may be installed in *any* room (CX 66"O").

f. The 50–foot "Spacing rating" of the "Vanguard Thermosonic" Model V–50 ft. Heat Detector means that Underwriters' Laboratories rates a single V–50 ft. detector as capable of monitoring rooms up to 50 by 50 feet in size for dangerous heat producing fires (CX 66P).

g. Of course, the rooms in most homes are much smaller than the 50′ by 50′ rating of the "Vanguard Thermosonic," but the higher thermal efficiency of the detector is not wasted in these small rooms. Instead, this extra protective range is translated into even faster activation and more time to escape and into more flexibility in the allowable locations for the detectors so that it can still monitor the entire room even when it is not mounted in the center of the room (CX 66Q). [31]

64. Interstate recommends to homeowners that heat detectors be installed in all major areas of the home including kitchens, living rooms, dens, family rooms, studies, recreation rooms, furnace rooms, basements, bathrooms, storage rooms, porch areas, garages, laundry rooms and attics (CX's 66M, 135, Admission No. 27).

65. Vanguard distributors are instructed by Figgie-Interstate to have consumers sign a release acknowledging that only "partial fire detection protection" has been purchased if less than the recommended number of heat detectors is ordered (CX 75; Hammack 257).

IV. FIGGIE-INTERSTATE MADE REPRESENTATIONS ALLEGED IN PARAGRAPH FIVE OF THE AMENDED COMPLAINT

A. *Standards For The Determination Of The Meaning of Advertisements*

66. In determining whether a sales presentation and promotional material discussed in Section III hereinabove made a particular representation, the appropriate standard is whether, taking the material individually or as a whole, the representation is a reasonable interpretation of that material. The question is whether the representation at issue is an interpretation of the material to which more than an insubstantial number of reasonable consumers would adhere. Since more often than not several reasonable interpretations of a

given material are possible, it is not necessary that the claim found to have been made be the only or the most reasonable interpretation of the material.

67. The primary evidence with respect to the meaning of the promotional materials is the representations contained in those materials, when considered individually or as a whole. The record also contains evidence as to the meaning of the promotional materials in the form of expert testimony provided by Dr. Joel Cohen.

68. In determining the issue of representations, I have primarily relied on my own knowledge and experience to determine what impression or impressions a promotional piece as a whole is likely to convey to a reasonable consumer. When my initial determination agreed with Dr. Cohen's testimony, I rested. When my initial determination disagreed with Dr. Cohen's testimony, I reexamined the material before reaching a final determination. I have not relied on Dr. Cohen's testimony when, after careful study and reflection, I found it to be unpersuasive and contrary to the weight of evidence. **[32]**

B. *Expert Testimony Concerning The Meaning Of Vanguard Heat Detector Promotional Material*

69. Joel Cohen, Ph. D., is a professor of marketing and director of the Center for Consumer Research at the University of Florida. He specializes in consumer behavior and impression formation and attitudes (Cohen 270–71). The Center for Consumer Research studies consumer behavior and facilitates research on consumer behavior. It is formally related to both the marketing department and the consumer psychology program at the University (Cohen 272–73). In addition to his work with the Center for Consumer Research, Dr. Cohen teaches undergraduate and graduate courses in consumer behavior, cognitive psychology and consumer information processing (Cohen 274). He has taught in the marketing department at the University of Illinois, developing a consumer behavior curriculum and has been the director of the social and behavioral science division of National Analysts, a major marketing and social science research organization (Cohen 276). In this last position, Dr. Cohen was named vice president of the parent firm, Booz, Allen & Hamilton. In that position, he conducted surveys and studies concerning consumers' interpretation and evaluation of advertising claims for various products, including medications and automobiles (Cohen 277). His area of specialization, based upon this education, training and experience, is "consumer information processing," the process by which consumers interpret and evaluate the advertising or promotional materials presented to them, and the effect that those materials have upon the consumers (Cohen 278–

79). Dr. Cohen has testified previously as an expert in consumer information processing before the Federal Trade Commission, the Senate of the United States, and various state government agencies. He has also written extensively in the area of consumer behavior and consumer information processing, as shown by the articles and studies identified in his *curriculum vitae,* CX 59 (Cohen 279–81).

70. Based upon his background, training, education, experience and study of respondent's sales methods and materials, Dr. Joel Cohen is well-qualified as an expert in the field of consumer behavior and consumer information processing, and he is fully competent to assist the Commission by providing his expert testimony on the meaning and effect of respondent's advertising and promotional representations concerning Vanguard heat detectors. Dr. Cohen's opinions are based upon his application of his expertise to a review and analysis of CX 61 - CX 81 and CX 129 - CX 133 (Cohen 271).

71. Dr. Cohen discussed in detail the Vanguard heat detector promotional material he reviewed and testified that the material he reviewed and discussed contains the representations [33] alleged in Paragraph Five of the amended complaint (*see* Cohen 302–09, 381–83, 390–428, 442–43).

72. It is also Dr. Cohen's view that the promotional materials he reviewed "all contribute to the very clear net impression that is alleged in Paragraphs 5(1) and 5(2)" of the amended complaint and further that to conduct a study designed to determine whether the promotional materials he reviewed do in fact convey the alleged claims to consumers "would be a waste of taxpayer's money" because "the record is very clear" and such a study is not needed (Cohen 430–31).

73. On cross-examination, Dr. Cohen also agreed that:

a. Respondent did not represent that heat detectors will provide the necessary warning to all occupants of a house no matter where the detectors are installed (Cohen 446) or where the occupants are located (Cohen 447) or where the fire occurs (Cohen 452) or what type of fire occurs (Cohen 452) or under all circumstances (Cohen 452).

b. Respondent did not represent that installation of a single heat detector anywhere in a house will ensure that all occupants of the house will be given the necessary warning to escape safely (Cohen 443–47).

c. Respondent did not represent that in the event of most fires heat detectors alone will provide the necessary warning to occupants to allow them to escape safely under all circumstances nor is it likely that a consumer would derive such an impression from the sales material (Cohen 457–58).

d. Respondent did not represent that its heat detectors will perform equally well no matter where they are placed (Cohen 446). [34]

C. *Vanguard Heat Detector Promotional Material Containing Representations Alleged In The Amended Complaint*

74. The representation alleged in Paragraph 5(1) of the amended complaint that "in the event of most fires, respondent's heat detectors provide the necessary warning to occupants to allow them to escape safely" is made directly or by implication in the following promotional material:

a. The old and new slide presentations (CX's 129–33; Tr. 1586–1604), discussed in F. 36–40, *supra;*

b. CX 61, *Disneyland Hotel,* a promotional brochure discussed in F. 41–49, *supra;*

c. CX 63, *News Bulletin,* a promotional piece discussed in F. 50, *supra;*

d. CX 67 and CX 80, *The Purpose of My Visit,* promotional pieces discussed in F. 52–53, *supra;*

e. CX 68, *Are Smoke Detectors Really Enough Protection From Fire?* a promotional piece discussed in F. 54–55, *supra;*

f. CX 69, *If You're Serious About Fire Protection,* a promotional piece discussed in F. 56, *supra;*

g. CX 70, *Highlights of Over One Thousand Vanguard Activations in Real Fire Situations,* a promotional piece discussed in F. 57, *supra;*

h. CX 71, a promotional booklet, discussed in F. 58–60, *supra;*

i. The Cardboard House (CX 81) demonstration, discussed in F. 62, *supra;* and

j. The warranty book (CX 66), discussed in F. 63, *supra.*

75. In CX 61 (*Disneyland Hotel*) and the Cardboard House demonstration (CX 80), the single message that is conveyed to the consumer is that Vanguard heat detectors are dependable fire protection devices and will give early fire warning for a safe escape in most residential fires. [35]

76. In the other promotional and the so-called warranty book (CX 66) referred to in F. 63, *supra,* the claim that Vanguard heat detectors are dependable fire warning devices that have saved many lives is made, along with a companion claim that the Vanguard combination system provides increased fire protection. The degree of emphasis placed upon the effectiveness of Vanguard heat detectors vis-a-vis smoke detectors varies from one promotional piece to the next. However, there can be no disputing that every one of them clearly conveys the effectiveness claim for Vanguard heat detectors alleged in Paragraph 5(1) of the amended complaint.

77. Another way the effectiveness claim alleged in Paragraph 5(1) of the amended complaint is made in the photograph of five heat detector/one smoke detector configuration so prominently featured in a number of promotional pieces, including CX's 61H, 67P, 69A, 71Z–13, and 80Q. A picture speaks a thousand words. Any reasonable consumer viewing these photographs will come away with the message that Vanguard heat detectors are effective residential fire warning devices and should be the core of any residential fire protection system.

78. Virtually all of the promotional materials discussed hereinabove, with the exclusion of CX 61 *Disneyland Hotel* and the Cardboard House demonstration (CX 80), contain express and implied claims that the combination system combining Vanguard heat and smoke detectors significantly increase the level of fire warning protection than smoke detectors alone, as alleged in Paragraph 5(2) of the amended complaint.

79. Some pieces are entirely devoted to conveying this single message to the consumer. They include CX 68, *Are Smoke Detectors Really Enough Protection From Fire?*, discussed in F. 54–55, *supra* and CX 69, *If You're Serious About Fire Protection, Install Vanguard The Reliable Combined Fire Protection System.* Indeed, respondent's dispute with this complaint allegation is indefensible.

80. In addition, CX 66 and CX 69 also contain express and implied statements and material which tend to confuse and mislead reasonable consumers as to what the standard-setting bodies in the field of fire protection and fire alarm devices had to say about the simple or comparative effectiveness of heat detectors and smoke detectors.

81. For example, CX 66M (warranty book) discussed in F. 63(d), *supra,* confuses and misleads readers into believing that the message which follows the subheading "CAUTION" is a continuation of Section 2–1 of the NFPA, when in fact the cautionary portion in the text is not a statement made by NFPA or contained in NFPA 74–1980, but rather Interstate's own. [36]

82. CX 69D, discussed in F. 56(c), *supra,* refers to and discusses NFPA Standard No. 74 in such a way as to leave the reader with a distinct impression that a standard setting body named the National Fire Protection Association regards both smoke detectors and heat detector equally effective when in fact both the 1978 and 1980 versions of current Standard 74 made installation of smoke detectors in certain areas of a household *mandatory* while at the same time making installation of *additional* heat detectors *optional* along with installation of additional smoke detectors.

83. It is only fair to point out here that the bulk of the Vanguard heat detector promotional material discussed hereinabove also con-

tains, in addition to the claims alleged in the amended complaint, useful information which will make the consumer more aware of the real danger of residential fires and think about the need for appropriate fire protection measures, including installation of dependable early fire warning devices.

84. The fact that the promotional materials are presented to the consumer through in-home sales presentations by a salesman heightens the impact of the materials because the captive consumer's attention is focused for the duration of the sales presentation (Cohen 572).

85. The effectiveness of Figgie-Interstate's promotional materials in convincing consumers that heat detectors provide the necessary warning and to increase significantly the level of fire protection than smoke detectors alone is demonstrated by the fact that Vanguard purchasers buy between four and five heat detectors for every one smoke detector (F. 18, *supra;* CX's 125, 127).

V. THE RESIDENTIAL FIRE PROBLEM AND FIRE WARNING DEVICES—THE NEW LEARNING

A. *The Expert Witnesses*

86. Burton A. Clark, called by complaint counsel, is a teacher at the National Fire Academy of the Federal Emergency Management Agency (FEMA). Mr. Clark has been in the fire service for over 14 years, as a fire fighter, consultant on fire safety and teacher and has created educational programs on residential fire protection equipment (Clark 652–56). In 1978, the National Fire Academy invited him to join its teaching staff, where he has since taught a national course in fire detection devices (Clark 657). Mr. Clark is a member of the National Fire Protection Association (NFPA) and the International Society of Fire Service Instructors, and has published a paper in the *Fire Engineering Journal,* entitled, "Systems Analysis of Early Warning Residential Fire Detection Concepts" (Clark 660–61). He participated in the California Fire Chiefs Association Fire Detector Tests, helping to develop the tests and the data [37] collection and observation methods (Clark 664). Based upon his training and experience with fires and fire detection devices, Mr. Clark is qualified as an expert in the field of fire science.

87. Richard W. Bukowski, called by complaint counsel, is a research engineer at the National Bureau of Standards ("NBS"). Since 1975, Mr. Bukowski has been involved in the NBS testing and research on fire protection devices, fire alarm systems, flammability characteristics of building contents, and the behavior of fire as it spreads throughout a building (Bukowski 950–51). Mr. Bukowski is a licensed professional engineer and member of the National Fire Protection

Association (NFPA) and also a member of both the NFPA committee which creates and reviews standards for fire detection devices for commercial building and of the NFPA committee on household fire detection equipment, which sets standards for the installation and use of fire detectors and fire detection equipment in homes known as the "NFPA Standard 74" (Bukowski 952–53). He had been a project engineer at Underwriters' Laboratories, where he had the primary responsibility for testing fire detection devices, including the Vanguard heat detector, for compliance with Underwriters' Laboratories standards (Bukowski 1025). Mr. Bukowski also worked on Underwriters' Laboratories Standard 539, for single station, mechanically-powered, heat detectors, such as those manufactured by Figgie-Interstate (Bukowski 947). In recent years, Mr. Bukowski has been involved in the development and evaluation of tests of fire detection systems aboard the NASA space shuttle and is currently working with the Houston Manned Space Flight Center on a fire detection system for the NASA space station. He has also worked with the Smithsonian Institution on fire detection systems and has been consulted by the Secret Service regarding the fire protection system in the White House (Bukowski 957).

88. Mr. Bukowski was involved in the deliberations of the NFPA committee related to the 1978 revision of NFPA 74 which became NFPA 74–80. He is familiar with residential fire tests conducted in this country in recent years and is particularly knowledgeable with the Indiana Dunes Test I and II, discussed hereinafter. He was instrumental in designing the Indiana Tests and assisted in the conduct of these tests (Bukowski 952–53, 966–70; CX 23B-C).

89. Based upon his background, training, education and experience, Mr. Bukowski is well-qualified as an expert on the behavior of fire and the effectiveness of household fire warning equipment including heat detectors.

90. Wayne M. Martin, called by complaint counsel, is a fire protection engineer, currently with the fire department of the city of Los Angeles. During the past ten years, he has been responsible for the research unit in that fire department's Fire Prevention Bureau, as well as for the fire inspection of the San Fernando Valley portion of the city of Los Angeles. Mr. Martin [38] is a licensed professional engineer, both in civil engineering and in fire protection engineering, and a member of the California Fire Chiefs' Association and of the California State Association of Fire Educators. He teaches "Building Construction for Fire Protection" and "Fire Protection Equipment and Systems" at Los Angeles Valley College and at U.C.L.A., and a course called "Life Safety Factors" at U.C.L.A. He has also taught at the National Fire Academy, covering topics including smoke detec-

tors and life safety checking of building plans (Martin 737–53). Mr. Martin was the site engineer for the California Fire Chiefs' Association Fire Detector Tests ("Cal Chiefs' Tests"), discussed hereinafter. Based upon his education, training and experience, Mr. Martin is qualified as an expert in the field of fire science.

91. John E. Lee, called by respondent, is a retired fire-chief now working in a public relations function for Figgie-Interstate. Until he retired at the end of 1982, he had been Chief of the Charlotte Fire Department, Charlotte, North Carolina for over 11 years (Lee 1522–23, 1539–40). During his pre-retirement years, Mr. Lee was active in the International Association of Fire Chiefs ("IAFC") as a division president, and a board member and served as IAFC's International President, 1980–1981. Mr. Lee also served for five years as Chief of Oak Ridge Fire Department, Oak Ridge, Tennessee, as chief of training of the St. Petersburg, Florida Fire Department and as fire fighter, company officer and training officer in the North Miami, Florida Fire Department (Lee 1523–24). Based on his professional training and experience in the municipal fire protection field, Mr. Lee is qualified as an expert on household fire warning devices. However, he indicated that he has read the fire tests discussed hereinafter but he was not an engineer and not familiar with the technical details regarding their methodology (Lee 1537–39).

92. John Patrick Ward, called by respondent, is currently Commissioner of Public Health and Safety in Springfield, Illinois, a position he has held for over nine years. He has served as Fire Chief at Fort Leonard Wood, Missouri, and as Director of Public Safety, State Colleges and Universities of Illinois. At various times, he was also Project Director for the U.S. Department of Commerce Fire Protection Master Plan, a technical service specialist at the National Fire Prevention Control Administration, project director for the development of a national arson training program, and served on several committees at the National Fire Academy. Mr. Ward also served as a fire protection consultant to local, state and federal government agencies and to private manufacturing firms. Mr. Ward is also experienced in the installation and operation of fire protection systems, including sprinkler and early warning systems, and has been involved in various committees in research projects around the country, including the San Francisco Sprinkler Test (Lee 1696–1701). Based on his training and experience, Mr. Ward is [**39**] qualified as an expert in the field of fire protection and related systems and devices.

B. *The Residential Fire Problem*

93. About three million fires were reported in 1981 in the United States, causing over 30,000 civilian injuries, 7,500 deaths and some

$6.5 billion in property losses. Although residential fires accounted for only 25% of all reported fires, they claimed 80% of fire deaths, 65% of fire injuries and 46% of property losses from fire. Thus, residential fires represent the largest threat to life and safety (Clark 669–70; CX 28J-L).

94. In terms of causes of residential fires, smoking led the death list with 27% although it accounted for only 8% of such fires, while heating and cooking combined, accounting for over 40% of residential fires, caused 17% of residential fire deaths (Clark 673; CX 28L). Thus, smoking is by far the leading cause of residential fire deaths in the United States.

95. And most fire deaths occur at night during the sleeping hours when residents may not become aware of the fire until it becomes too late for a safe escape (Clark 675; CX 23P).

96. The 1973 Report of the National Commission on Fire Prevention and Control, entitled *America Burning,* also called attention to what it calls "the living victims" of fire (CX 29, p. 11, also quoted in CX 71I):

> Fire kills. But fire has its *living* victims too: those who grieve the loss of loved ones killed by fire, . . . those who are left homeless or jobless or impoverished because of fire. The victims most poignant to consider are those maimed and disfigured by burn injuries. About half of these victims are children. . . .
>
> Among the illnesses and injuries that require long hospitalization, few are as traumatic as severe burns.
>
> * * * * * * *
>
> The average hospital stay for a burn victim is over three times that of medical and surgical patients. An individual's hospital stay and later treatment can add up to $60,000 or more. . . . [40]

97. Fires resulting in deaths typically originate in living rooms or bedrooms (Clark 675). They do not typically originate in kitchens or furnace rooms. A study conducted by the National Fire Protection Association indicates that living rooms and bedrooms are the point of origin in 67% of all "fatal" fires (RX 14, p. 23).

98. The most likely victims of fire are the very young (ten years of age and under), the old (65 and over) and the infirm (Clark 670). This is explained in part by the fact that these groups are the least capable of taking care of themselves and therefore need more time to escape (Clark 670–71).

99. The majority of fires resulting in fatalities are started by smoking materials dropped on upholstered furniture or bedding. These types of fires typically smolder for long periods of time and generate toxic gases and large quantities of smoke without significant heat buildup (Clark 674; Martin 830).

100. The 1973 Report of the National Commission on Fire Preven-

tion and Control listed the five ways in which fire can kill in declining importance and had this to say (CX 29, pp. 62–63, also quoted in CX 71H):

a. *Asphyxiation.* Fire consumes oxygen from the surrounding atmosphere, thus reducing its concentration. If the oxygen concentration falls below 17 percent, thinking may be an effort and coordination difficult. Below 16 percent, attempts to escape may be ineffective or irrational, wasting vital seconds. With further drops, a person loses his muscular coordination for skilled movements, and muscular effort leads rapidly to fatigue. His breathing ceases when the oxygen content falls below 6 percent. At normal temperatures, he would be dead in 6 to 8 minutes.

b. *Attack by superheated air or gases.* With temperatures above 300° F., loss of consciousness or death can occur within several minutes. In addition, hot smoke with a high moisture content is a special danger since it destroys tissues deep in the lungs by burning.

c. *Smoke.* Inhalation of smoke—or, more correctly, of the products of incomplete combustion—kills people who suffer no skin burns at all. In addition to carrying toxic products, such as carbon monoxide and hydrogen [41] cyanide, thick smoke may be laden with organic irritants, such as acetic acid and formaldehyde. In the early stages of a fire, the irritants, which attack the mucous membranes of the respiratory tract, are often the more important danger. Smoke often blocks the visibility of exits.

d. *Toxic products.* Many toxic components of smoke are responsible for the damage done—including oxides of nitrogen, aldehydes, hydrogen cyanide, sulfur dioxide, and ammonia, to name only a few. There is ample evidence that the hazard of two or more toxic gases is greater than the sum of the hazards of each. Moreover, low oxygen and high temperatures increase the toxic effects. In addition to toxic gases that attack the lungs, there are irritants that attack the eyes with blinding effect, preventing escape. Some fire gases dull the senses of the victim or his awareness of injury.

e. *Flames.* Since the aforementioned factors can debilitate, confuse, blind, or kill without warning, the person who goes to sleep confident that advancing flames will provide sufficient warning for escape may be taking a fatal gamble.

Also see Martin 816–26.

101. Detectable quantities of smoke precede detectable levels of heat and the development of hazardous conditions in nearly all residential fires (CX's 1Z–18, 23K; Lee 1539; Martin 875; Bukowski 1013).

102. Hazardous levels of heat, smoke and toxic gases can occur within several minutes of fire ignition (Clark 697; CX's 66F, 71V, 133).

103. The most common cause of fire-related death is carbon monoxide poisoning (Clark 676). Carbon monoxide is a by-product of nearly all fires and can reach lethal levels without significant heat build-up (Clark 674, 677).

104. During sleeping hours most of the residential fire deaths are attributable to smoke in combination with gases. Most bodies are found with no burns on them. This shows that most of residential fire deaths are caused by smoldering fires and not by a flaming ignition (Martin 829–30). [42]

105. The purpose of a fire detection device is to warn occupants of

the existence of a fire in time to allow a safe escape through normal means of egress prior to the onset of hazardous conditions (Clark 677; Bukowski 973; CX 1G).

106. Fire scientists define "escape time" as the time lapse between detector alarm activation and the reaching of hazardous levels or "tenability limits," of heat, smoke or toxic gases within the room (Martin 815–17; CX 1G).

107. There is no unanimity among experts regarding precisely where tenability limits should be set for heat, smoke obscuration and carbon monoxide levels. The National Bureau of Standards has been engaged in on-going research in this area (Bukowski 1224). These levels cannot be set scientifically without taking into account many physiological factors beyond the expertise of engineers (Bukowski 1124, 1223). The tenability limits will no doubt be further refined as a better understanding of their chemical and physical nature as well as their physiological effects provide a surer foundation of knowledge for improved methodology in residential fire tests.

108. In recent years, in a series of residential fire tests discussed hereinafter, a broad consensus has emerged regarding the realistic tenability limits, largely reflecting the current knowledge available to fire science and the judgment of fire experts based on experience.

109. In these fire tests involving household fire warning devices, the tenability limits for heat were set at or near 150° F.; for smoke obscuration, between 10% and 11%; and for carbon monoxide, between 400 and 1,000 per million (F. 127–32, 142, *infra*). However, it has been conceded that carbon monoxide level of 400 per million (used in the Dunes I) was too low (F. 132, *infra*).

1. UL Listing Of Heat Detectors Does Not Assure Their Capability To Provide Adequate Escape Time In Real Fire Situations

110. Underwriters' Laboratories ("UL") is a non-profit organization whose purpose is to maintain and operate laboratories for the examination and testing of devices, systems and materials (RX 13, p. 2). UL also establishes performance standards against which various products are tested. When a device meets the applicable standard it receives a UL listing, signifying that the product has been tested by UL and satisfied UL's standard requirements (Bukowski 1021–22). [43]

111. Vanguard heat detectors have been tested and listed by UL. However, UL tests are not intended to demonstrate the effectiveness of any detection device under real fire conditions (Bukowski 1029). There are three principal tests for heat detectors: the water bath test, the oven test and the fire test (Bukowski 1023).

112. The water bath test consists of immersing a heat detector in

water, the temperature of which is increased at a rate of 1° F. per minute. The water temperature is recorded at the time of alarm activation. This test is designed only to determine whether the fuse element of the detector will melt when it reaches its stated temperature (Bukowski 1023).

113. The oven test consists of placing a heat detector in a circulating air oven, the temperature of which is increased from 80° F. to 240° F. over a four-minute period. The time and temperature are recorded at the instant the heat detector goes into alarm (RX 13, p. 8). Oven test results show that the Vanguard 136° heat detectors do not activate until oven temperature reaches 185° to 200° (Bukowski 1025).

114. The oven test results are a clear demonstration of the principle of thermal lag (Bukowski 1024). "Thermal lag" refers to the time lag before the fuse of a heat detector absorbs sufficient heat from the surrounding air to activate. Thus, in the event of a fire, a 136° heat detector will not activate when ambient temperature reaches 136° but will activate at some later time when the fuse itself reaches 136°. During this interim period, a developing fire will have raised ambient temperature well in excess of the heat detector's stated activation temperature. The faster a fire develops, the greater the thermal lag will become (Bukowski 978).

115. All heat detectors, including Vanguard, are subject to thermal lag (CX 135, Admission No. 21). For this reason, UL requires that each heat detector be marked with the following statement:

> Operation - Responds to a heat producing fire only. Unit will activate when the temperature of the surrounding air reaches the marked temperature rating (plus or minus a few degrees) provided the air temperature increase is 1° F. (0.6° C.) per minute or less. At faster rates of temperature rise, the surrounding air temperature at which the unit will activate will be above the marked rating, the temperature differential depending on the rate of rise of temperature produced by a fire. This temperature differential results from the time lag before the temperature element absorbs the [44] necessary heat from the surrounding air to activate. This notice is placed on the back of the heat detector (RX 13, p. 17).

116. Thermal lag is one reason why heat detectors cannot provide immediate early warning (Bukowski 1038). Since residential fires can jump as much as 750 degrees in 10 seconds (that is, 70 degrees per second), thermal lag is a serious problem (Martin 820, 931).

117. In UL's fire test, two large pans of alcohol, with a total surface of 18 square feet, are ignited. The heat release rate of this fire is equivalent to that generated by 24 home furnaces operating simultaneously. In UL fire test, the heat detectors which are located no more than 35 feet from a point directly over the fire, activated in two minutes or less. Air temperature at the time of activation was not

measured. The amount of heat generated in UL's fire test is not likely to be duplicated in any but the final stages of a residential fire (Bukowski 1027–29).

118. Therefore, no conclusions can be drawn about heat detector performance under actual fire conditions from UL tests or from the fact the Vanguard heat detectors are UL listed (Bukowski 1035), except that thermal lag causes delayed detector activation.

119. Similar concerns were reflected in the 1973 National Commission Report excerpts of testimony given to the Commission by William J. Christian, consulting engineer, United Laboratories, Inc., on the subject of fire detectors, which stated in part (CX 29, p. 121):

> a. Three types of fire detectors are most commonly used in this country. These are known by the generic terms as heat detectors, smoke detectors, and flame detectors. Only heat and smoke detectors appear to have application to the household fire detection system. . . .
>
> b. In the late 1950's, self-contained non-electrical fire alarm units were being sold door-to-door. A unit of this type consisted of a heat detector . . . Because these units respond only to a temperature rise, they are intended for use in areas where a fire producing a great deal of heat is likely to occur, such as near a furnace, but they have also [45] been employed throughout other rooms in a home. . . .
>
> c. In order to be of value in providing life safety, a fire detection system must make provision for detecting a small smoldering fire soon enough that alarm can be given and the building evacuated before untenable smoke conditions are reached. In addition, but of less relative importance, the fire detection system ought to be capable of early detection of rapidly developing hot fires.
>
> d. Smoke detectors of the photoelectric and ionization types provide means for detecting smoke from either type of fire. . . . Heat detectors, on the other hand, provide early warning of hot fires in their immediate area only. . . .

120. The National Fire Protection Association (NFPA) is an independent, non-profit organization which operates by way of numerous volunteer committees composed of experts from all corners of the fire protection field, including engineers and fire detection equipment manufacturers. The Association serves as a clearinghouse for fire protection information and establishes various standards that are used as model codes for adoption by state and local governments. Standard 74 relates to the location and type of fire detection devices to be installed in a residence (Bukowski 952; CX 23).

121. In 1966, the NFPA tentatively adopted a new draft NFPA 74. Following extensive discussion of the 1966 draft, NFPA 74 was revised several times, most recently in 1978. The 1978 edition was approved by the American National Standards Institute as an American National Standard. The 1980 edition of NFPA 74 (CX 23) was adopted and released in the late months of 1980. Public authorities are urged by the NFPA to adopt this document by reference into laws, ordinances and regulations (CX 23B).

2. The Indiana Dunes Tests

122. The Indiana Dunes Tests were conceived as a result of proposed amendments to the National Fire Protection Association's Standard 74 raised at its 1974 annual meeting (Bukowski 964–65). These amendments involved a departure from the earlier standard, which mandated a heat or smoke detector in every room of the home. The amendment as adopted in 1974 established four levels of protection, varying from each other in terms of the [46] number and type of detection devices required. The minimum level consisted of smoke detectors alone in the vicinity of bedrooms and on every other level of the home. To address the concerns of some fire marshalls who felt that a detector in every room was necessary for adequate fire protection in homes, the Indiana Dunes test was conceived (Bukowski 964–66).

123. The Indiana Dunes Tests were designed and conducted through the joint efforts of the National Bureau of Standards and Underwriters' Laboratories (Bukowski 968). The tests were conducted in actual homes and the kinds of fires set were determined by NFPA statistics illustrating typical residential fire scenarios (Bukowski 969). In keeping with national statistics, 60% of the fires involved smoldering ignitions, such as cigarettes dropped on upholstered furniture, and 40% of the test fires involved flaming ignitions (Bukowski 969–70). The homes were extensively instrumented with measuring devices for such factors as heat, smoke and carbon monoxide. The instrumentation was located in the room of fire origin and at strategic locations along the "primary escape paths" within the home, that is, hallways and stairwells leading to the outside (Bukowski 971).

124. In the first series of tests, Dunes I, smoke detectors of varying sensitivity available on the market were tested along with rate-of-rise heat detectors. Thermocouples, a heat measuring device, were used to simulate the performance of a fixed-temperature heat detector, such as the Vanguard (Bukowski 973–74, 1136). A thermocouple provides a continuous read-out of surrounding temperature. It functions in the same way as a fixed-temperature heat detector, so that when the thermocouples register 136°, heat detector activation was presumed. Because thermocouples are subject to virtually no thermal lag, however, their response time to fire is faster than that of an actual fixed-temperature fuse heat detector (Bukowski 977–78).

125. All the various detection devices were mounted side by side and placed in the rooms of fire origin and in the hallways on each level of the home (Bukowski 982–83).

126. After the fires were set, all detection devices were monitored for time of activation after ignition. Performance of each detector was

evaluated based upon the amount of escape time provided between activation and the onset of hazardous conditions which would impede or prevent escape (Bukowski 987).

127. There is substantial agreement among fire science experts that a temperature of 150° F. measured at a level five feet from the floor constitutes an untenable environmental condition which will seriously impede successful escape (Bukowski 985; Clark 684; Martin 819; CX 135, Admission No. 31; RX 16, p. 97). According to Mr. Bukowski, human tolerance to temperature is in part a function of the relative humidity of the air and the level of exertion of that person. Under very dry [47] conditions when the evaporative cooling system of a human works most efficiently, the absolute upper limit of heat tolerance would be 212° F. Mr. Bukowski testified that assuming average humidity and a high level of exertion as would be found in an individual escaping a fire, 150° is a reasonable tenability limit (Bukowski 993–94). However, in a later sprinkler test in which Mr. Bukowski was involved, the assumed safe level of temperature was 200° (Bukowski 910, 937).

128. According to Mr. Martin, 150° represents the temperature at which most fires will experience accelerated growth leading to considerably higher temperature within short periods of time. For example, instances have been reported in which ambient temperature has climbed from 150° to 700° in ten seconds (Martin 820, 931).

129. In any event, 150° was chosen as the heat tenability limit for the Dunes test. If a detector failed to activate in advance of 150°, it was concluded that the device provided no escape time (Bukowski 985).

130. Smoke buildup also constitutes a potentially hazardous environmental condition, the effect of which can impede safe escape. Smoke can induce panic and disorientation in addition to causing eye, skin and lung irritation and impeded respiration (Clark 679–80). Reliable technical literature indicates that smoke obscuration of 7% to 15% per foot effectively blocks escape routes (100% smoke obscuration per foot equals no light transmission through one foot of smoke) (Bukowski 1000; Clark 682). The 7% figure is generally accepted in the literature as appropriate where people must travel long distances through unfamiliar surroundings to escape; the 15% per foot figure is appropriate where people have shorter distances to travel in familiar surroundings, such as their own homes (Bukowski 1000). Expert testimony indicates that, at the "midway" point of 11% obscuration, a person could not distinguish a male from a female standing only 15 feet away (Martin 824).

131. In one reliable study involving human subjects and smoke obscuration levels, it was determined that a completely blindfolded person suffering from none of the side effects of smoke could exit a

building faster than those who were exposed to smoke obscuration of 15% (Bukowski 1001). Smoke obviously does more than merely impair vision. Mr. Bukowski chose 15% smoke obscuration as the tenability limit for the Dunes test. If a detector failed to alarm in advance of 15% smoke obscuration, it was concluded that such a device provided no time for escape (Bukowski 985).

132. There is a substantial agreement among fire science experts that exposure to carbon monoxide in a concentration of between 800 to 1,000 parts per million for a period of 30 minutes will seriously impede a safe escape (Martin 821–22; Bukowski 1003–04; Clark 678–79). The tenability limit of 400 parts per [48] million for carbon monoxide chosen for the Dunes test was thus too low. However, this tenability limit did not affect the results of the Dunes test because the smoke tenability was reached first in every test (Bukowski 1004–05).

133. The results of the Dunes I tests indicate that in the 37 tests conducted a heat detector was never the first device to be activated (Bukowski 986). In 14 of the 37 tests no heat detector alarmed at any time (Bukowski 986). The average escape time provided by heat detectors for all 37 tests was a negative 2.2 minutes, which means that heat detectors failed to alarm until 2.2 minutes *after* a tenability limit had been exceeded (Bukowski 987). The corresponding escape time provided by smoke detectors was a positive 18.6 minutes (Bukowski 988).

134. An analysis of the Dunes I data indicates that smoke detectors located on every level of the home provided at least three minutes warning in 89% of the experiments. And, the addition of fixed temperature heat detectors in every room of the home, along with the every-level smoke detectors, provided no increase in escape time (Bukowski 988–89).

135. Dunes II, conducted in the fall of 1975 through the summer of 1976, employed methodology similar to that of Dunes I, except that actual heat detectors, including Vanguards, were used in lieu of thermocouples (Bukowski 990). This change was made in response to criticism from Edward Gallagher, Figgie-Interstate's chief engineer, who reviewed and criticized Dunes I. Mr. Gallagher believed that Figgie's heat detectors would perform better than the thermocoupled devices (Bukowski 991–92). However, the performance of the actual heat detectors, subject to thermal lag, was considerably slower than that of the thermocouples used in Dunes I. Not one of the heat detectors tested provided 3–minute escape time in any one of the 22 tests in Dunes II (Bukowski 991).

136. The Dunes test results reviewed hereinabove are consistent with the results of similar fire tests conducted over the years (Bukowski 1005–06).

3. The Cal Chiefs' Tests

137. The California Fire Chiefs' Association Residential Fire Detector Test Program, also known as the "Cal Chiefs' Tests," were conducted by the Los Angeles City Fire Department in 1978 (Martin 754). The executive summary of this report is included in the record as CX 1A through CX 1Z–19. The objective of this study was to investigate and report on the amount of escape time afforded by various fire detection devices under actual residential fire conditions (CX 1C). [49]

138. The test was sponsored by the fire service and manufacturers of various kinds of detectors (Martin 757–58). Figgie-Interstate donated both funds and Vanguard heat detectors to aid in the conduct of the tests (CX 135, Admission No. 35; Martin 759). Edward Gallagher, then Chief Engineer for the Interstate Engineering division of Figgie, performed a major role in planning test procedures (Martin 759).

139. The test houses were typical one- and two-story homes and were completely furnished. As in the Dunes tests, instrumentation was installed to monitor heat, smoke obscuration and carbon monoxide. In both test homes, panels of eight detectors each were mounted in the living rooms, bedrooms, kitchens, attics, heater rooms and hallways. Each panel consisted of three ionization smoke detectors, three photoelectric smoke detectors and two 136° fixed-temperature heat detectors (CX 1D-E). Every detector panel in every test included a Vanguard heat detector (Martin 818).

140. Eleven test scenarios were developed based upon a statistical survey entitled "California Fire Incident and Reporting System" prepared by the California State Fire Marshall. The scenarios chosen represented typical fatal residential fires of both the flaming and smoldering type (CX 1E). Each scenario was repeated a number of times in each house under varying conditions, *i.e.*, bedrooms doors and windows open or closed, furnace on or off. Although the original test design involved only typical fatal fire scenarios, Edward Gallagher of Figgie, insisted that more flaming type kitchen fires be included in the test. Despite the fact that a relatively small number of fatalities are caused by kitchen fires the design was revised to include 24 kitchen fires in 71 tests (Martin 762–63).

141. As the test fires were ignited, the activation time of each detector was monitored. Evaluation of detector performance was based upon the amount of time provided between detector activation and the onset of any one of the tenability limits (Martin 815).

142. Consistent with the Dunes tests and the opinion of fire researchers, the California tests employed 150° F. as the tenability limit for heat (Martin 819). The tenability limit chosen for carbon monoxide concentration was 1,000 parts per million. Based on available scientif-

ic literature, exposure to this level of carbon monoxide for a period of 30 minutes may render the victim unable to walk (Martin 821–22). The tenability limit chosen for smoke obscuration was 11% per foot. At 11% smoke obscuration, it is difficult to perceive the outline of a doorway only 15 feet away (Martin 824).

143. Although the Dunes tests used a smoke obscuration limit of 15% per foot and California 11%, the results of the two tests are similar. This is understandable because the time [**50**] difference between reaching 11% obscuration and 15% obscuration was under a minute in most cases (Bukowski 1002–03).

144. At the conclusion of the 71 test fires in the Cal Chiefs' tests, data analysis was performed under a contract between the International Association of Fire Chiefs' Foundation and California State University, Los Angeles. The staff at California State University then prepared a report in 1979 that was distributed in draft form (Martin 775).

145. Richard Bukowski of the National Bureau of Standards reviewed the 1979 draft report and identified some instances in which transposition errors in the labeling of data points had occurred. Uncertain as to the qualitative effects of the transposition errors, NBS recommended that the report not be published in that form (Bukowski 1008). Wayne Martin, the on-site project coordinator for the California tests (Martin 739), and other members of the Los Angeles Fire Department Research Unit undertook to verify the accuracy of the California State report and to make corrections where necessary (Martin 775, 783). After a review of the actual charts generated by recording instruments during the test fires and the audio tapes made for each test fire, the Los Angeles Fire Department was able to correct the instances of transposition errors contained in the 1979 draft (Martin 774, 777). A final report incorporating the corrections (CX 1) was prepared in 1983 (Martin 792). The 1983 report has been reviewed by Mr. Bukowski against his prior critique and comments, and he has found it to incorporate all the necessary corrections (Bukowski 1008).

146. CX 1 accurately summarizes the results of the California Fire Chiefs' Tests (Martin 803) and is considered to be a reliable authority by fire experts (Clark 700; Bukowski 1010). The National Fire Protection Association (NFPA) has recently expressed an interest in publishing the report (Martin 806).

147. The California tests indicate that the escape time provided by smoke detectors for both smoldering and flaming fires ranged between two to six minutes in advance of the onset of any hazardous condition or "tenability limit" (Martin 815). In only 8% of all test fires did a heat detector activate before a tenability limit was reached (Martin 878). In only 4% of all test fires did the heat detectors provide

at least two minutes advance warning before the onset of a hazardous condition (Martin 878). In all tests, the fastest acting heat detector never responded before a smoke detector (Martin 879).

4. The Minneapolis And Bloomington Tests

148. The California results are consistent with the results of other fire detection device studies, including "Minneapolis," [51] "Bloomington," "New South Wales," and "Indiana Dunes" (Clark 698; Bukowski 1009). The Minneapolis test, conducted in 1976 by the Minneapolis Fire Department, is another in a series of full-scale burn tests conducted in residential dwellings. Fire detection devices were evaluated by measuring activation time relative to monitored environmental conditions, such as heat, smoke obscuration and carbon monoxide concentration. One of the more relevant conclusions of this test was that heat buildup in the room of fire origin was highly uneven and greatly affected by the size of the room and the amount of air movement. On the other hand, smoke appeared to diffuse evenly throughout the room. The practical import of these facts is that a heat detector in one part of the room may not be exposed to the activation temperature when temperatures at other locations in the room may reach or exceed hazardous levels. The test report further concluded that smoke buildup in detectable amounts consistently occurred well in advance of detectable temperature increases. Fire experts agree that the Minneapolis test report is a reliable authority (Clark 690–96, 700; Bukowski 1012).

149. The Bloomington tests, conducted in 1969 by the Bloomington Fire Department, is an earlier burn test conducted under actual fire conditions. Smoke and heat detector performance was evaluated. The results of the tests indicated the general ineffectiveness of heat detectors. In one test scenario, a flaming kitchen fire elevated temperatures to 1,000° within one minute of ignition. The heat detector placed in the kitchen took over three minutes to activate while a smoke detector located in an adjacent hallway activated at three minutes. Fire experts regard this test to be reliable (Clark 689, 696–97, 700; Bukowski 1011–12).

150. Reliable residential fire tests conducted in recent years by fire service professionals show that heat detectors, including Vanguard heat detectors, will not provide occupants with enough time to escape safely before hazardous conditions of smoke, gases and heat develop in most residential fires. These tests include the Indiana Dunes Tests, conducted during the period 1975–1976, and the California Fire Chiefs' tests, conducted in 1978. These fire tests generally confirmed the findings of earlier fire tests, including the Minneapolis Test of 1976 and the Bloomington Tests of 1969. The Indiana Dunes Tests are

of particular significance for the reason that they were conceived largely to determine whether a detector should be required in every room for adequate fire protection as some fire marshalls felt in the amended NFPA 74 (Bukowski 964–66).

151. Based on the Indiana Tests, Cal Chiefs' Test and other fire tests discussed hereinabove, which were designed and conducted for the purpose of testing the actual performance and effectiveness of household fire warning devices, including heat detectors and smoke detectors, Messrs. Bukowski, Clark and Martin, concluded that hazardous or life endangering conditions (Martin 816–17) will develop before a heat detector activates in [**52**] most residential fires and that, therefore, heat detectors cannot be relied on to provide necessary warning to allow a safe escape in most residential fires (Clark 698; Martin 880; Bukowski 1005, 1009, 1013).

152. Mr. Bukowski also testified that heat detectors are not necessary in a household fire warning system (Bukowski 1058).

153. Messrs. Bukowski, Martin and Clark also testified that there was a general agreement among fire professionals that heat detectors do not give occupants sufficient early warning to allow a safe escape in residential fires for the reason that in most cases untenable environmental conditions would have developed which will seriously impede or block a safe escape (Clark 698–99, 703–04; *see* Martin 880; Bukowski 1013).

154. At the same time, Messrs. Clark and Martin conceded that heat detectors have a role in residential fire safety (Clark 705, 707; Martin 893). Mr. Bukowski also acknowledged that heat detectors are appropriate for use as fire warning devices in some areas of the home, such as attics, furnace rooms, garages, and kitchens, and that they are sometimes capable by themselves of providing necessary warning to allow residential occupants to escape safely (Bukowski 1185, 1200–01, 1212–13).

155. Messrs. Clark, Martin and Bukowski also acknowledged that a combination system of smoke and heat detectors offers a higher level of fire protection and a margin of safety (Clark 713; Martin 926; Bukowski 1203–04).

156. In its proposed findings, respondent faulted the qualifications of complaint counsel's expert witnesses, characterized them as advocates of smoke detectors, and criticized the methodologies employed in the Indiana and Cal Chiefs' Tests discussed hereinabove and suggested that their opinions are not entitled to much weight (*see* RPF 64–108).

157. As to the test methodology, the record shows a lack of unanimity among expert witnesses regarding the precise tenability limits for heat, smoke obscuration and the carbon monoxide level. Indeed, as

more knowledge and understanding is gained through further research, these limits may be further refined and a stronger consensus developed among fire scientists and fire professionals in the future. This is the nature of all scientific progress. However, record leaves no doubt that there is substantial agreement now among fire scientists, on the basis of current learning, as to what these limits should be, and they appear to have a rational, scientific basis (*see* F. 127–32, 142, *supra*).

158. Moreover, the brunt of respondent's criticism is directed to the 150° F. heat limit used in the Indiana and Cal Chiefs' tests (*see* RPF 87–93). Mr. Martin used 200° F. heat limit in a sprinkler activation test he was involved in (Martin [53] 910, 937). It may well be that healthy adults can survive a 200° F. heat exposure for a period substantially longer than three minutes, depending on such factors as the clothing and humidity (Bukowski 1112). However, for the purpose of residential fire safety, protection of the very young, the very old and the infirm is an important consideration. Therefore, 150° F. heat tenability limit appears to be reasonable.

159. More importantly, however, the record is clear that the majority of fires resulting in deaths are smoldering fires which generate large amounts of smoke and gases without significant heat buildup and that the combination of smoke and gases is the leading killer, most bodies showing no sign of heat damage (Clark 674; Martin 830). The record is also clear that in the Indiana and Cal Chiefs' tests, the smoke tenability was usually the first to be reached (Bukowski 986). Thus, the most crucial tenability limit in terms of life safety is smoke obscuration limit. And the record shows that both the 15% used in the Indiana test and 11% used in the California test have a firm scientific basis (Clark 682; Martin 824; Bukowski 985, 1000–03). In these circumstances, detectors which fail to activate when the smoke limit is reached but do so later when the ambient heat exceeds 150° F. cannot be relied on to give "early" or adequate fire warning in most residential fires.

160. Respondent also criticizes the 3–minute warning requirement set by Messrs. Bukowski, Clark and Martin (*see* RPF 84–85). However, the record shows that there is substantial agreement regarding the three minutes among fire scientists. The fact that some persons may be able to escape successfully in a shorter time after a tenability limit is reached in some residential fires does not invalidate the 3–minute standard.

161. At the same time, respondent would give great weight to the largely conclusionary statements of Messrs. Ward and Lee, mostly based on their professional experience, that heat detectors are reliable and effective residential fire warning devices. Neither of them

seemed to be familiar with the details of the Indiana and Cal Chiefs' tests.

162. Respondent also places heavy reliance on Vanguard heat detector purchaser testimonials and the testimony of several purchaser witnesses it called. Respondent asserts that these testimonials and consumer testimony give the true facts as to Vanguard heat detector's effectiveness (*see* RPF 9–22; CX 72). However they are at best anecdotal and do not rise to the same level as the fire tests designed and conducted by fire scientists.

163. Respondent also points to a few sprinkler tests and argue that they showed heat detector activation before "critical" or "real" or "actual" tenability limits were reached or exceeded (*see* RPF 95–98). According to Mr. Gardner, Interstate's chief engineer, in a series of four tests conducted in October 1983 by [**54**] the San Francisco Fire Department using heat detectors, smoke detectors and sprinklers, heat detectors activated before the sprinkler system in all four tests (Gardner 1342).

164. However, the record does not permit an informed evaluation of these "tests" for the purpose of determining whether Vanguard heat detectors can be relied on to provide adequate warning in most residential fires, for the simple reason that the record does not include these test reports and there is not much to evaluate except the brief conclusionary statements regarding the test results.

165. On the other hand, Mr. Ward, called by respondent, expressed his opinion, based on many years of experience as a fire safety professional, that heat detectors are effective residential fire warning devices (Ward 1696–1747). However, he did not offer any cogent criticism regarding the recent fire tests relied on by complaint counsel.

166. Messrs. Ward and Lee expressed the belief that common sense combined with actual experience suggest that a combination system incorporating both heat and smoke detectors is better than either heat or smoke detectors alone (Lee 1531, 1534; Ward 1709).

167. Mr. Lee also pointed out heat detector's reliability factor due to its mechanical operation, which becomes important in the event a smoke detector should fail because of a dead battery or a power failure, which is a significant problem (Lee 1525–28; RX's 1, 2, 4, 5).

168. Upon a closer examination of the evidence contained in the record as a whole and a careful consideration of the qualifications of the experts, it is found (1) that the reliable scientific evidence shows that heat detectors typically cannot be relied on to give household occupants the necessary warning to allow a safe escape in most residential fires because hazardous conditions seriously impeding or barring a safe escape will have developed before heat detector activation

in most fires; (2) that heat detectors have a limited role to play in certain areas of residences where smoke detectors are not suitable, such as kitchens and garages; and (3) that common sense and experience show that incorporation of heat detectors into a combined smoke-and-heat detector fire warning system can reasonably be expected to provide a significantly increased level of fire warning protection in most residential fires.

5. The 1982 Introduction Of Vanguard 117° F. Fused Heat Detectors

169. Figgie-Interstate has introduced 117° F. fuse heat detectors for sale for the first time in April 1982 (CX 93, Sterner Tr. 1614) and made it standard for Vanguard heat [**55**] detectors in August 1983 (Sterner 1615). The results of the UL test of the 117° detector show that it did not activate until the ambient temperature reached 157° F., indicating that thermal lag remains a serious problem (Bukowski 1042). A recent UL test involving 117° heat detectors (RX 19) activated only two to ten seconds faster than the earlier 136° detector (Bukowski 1044).

170. An analysis of the Indiana Dunes I data indicates that a 117° detector would have provided three minutes warning in only two more test fires, compared to the 136° detector. (The 136° detector provided three minutes warning in only five of the 37 test fires.) Moreover, this analysis is based on an assumption, favorable to the respondent, and that the 117° detector would not be subject to thermal lag (Bukowski 1040), that is, that the 117° detector would activate when the surrounding air reached 117° F.

171. From the foregoing, it is found that the new Vanguard 117° F. fuse heat detectors do not show sufficient improvement in performance to materially affect or alter the conclusions based upon the residential fire tests discussed hereinabove.

VI. REFLECTING THE NEW LEARNING FIRE PROTECTION PROFESSIONALS REVISED NFPA–74 IN 1978 SO AS TO MAKE INSTALLATION OF SMOKE DETECTORS IN CERTAIN AREAS OF THE HOUSE MANDATORY WHILE ACCEPTING HEAT DETECTORS AS AN OPTION ONLY IN A SUPPLEMENTARY SYSTEM

172. After the results of the Indiana Dunes tests were published and communicated by Richard Bukowski to the NFPA committee charged with responsibility for Standard 74 (Standards For Household Fire Warning Equipment), the Committee amended the Standard in 1978 to *require* smoke detectors on each level of the home and outside each sleeping area. All mention of heat detectors was dropped from the text of Standard 74 which refers to the required level of fire warning

protection. The pertinent portions of the 1980 edition of NFPA Standard 74 are the same (Bukowski 1015–16; CX 23K).

173. The 1980 edition of NFPA Standard 74 recommends that the homeowner consider additional smoke detectors for inside the bedrooms and for those areas separated by a door from the areas protected by the required smoke detectors (CX 23N).

174. The 1980 edition of NFPA Standard 74, however, refers to heat detectors in a footnote in a chapter entitled "Basic Requirements," as follows (CX 23F):

> 2–1.1.1 Smoke detectors shall be installed outside of each separate sleeping area in the immediate vicinity of the bedrooms and on each additional story of the family [**56**] living unit including basements and excluding crawl spaces and unfinished attics.*
>
> * * * * * * *

* The provisions of 2–1.1.1 represent the minimum number of detectors required by this standard. It is recommended that the householder consider the use of additional smoke or heat detectors for increased protection for those areas separated by a door from the areas protected by the required smoke detectors under 2–1.1.1 above. The recommended additional areas are: living room, dining room, bedroom(s), kitchen, attic (finished or unfinished), furnace room, utility room, basement, integral or attached garage, and hallways not covered under 2–1.1.1 above. However, the use of additional detectors remains the option of the householder.

The same footnote is repeated in reference to a later chapter entitled "Markings and Instructions," containing markings required in all sales, advertising, instruction or operating manuals where instructions for use are given (CX 23K).

175. Fire protection professionals also recognize that the installation of smoke detectors *required* by NFPA Standard 74 does not provide adequate protection for the occupants from a fire starting within their bedrooms or for those areas separated by a door from the protected areas and, for these reasons, recommend the use of additional smoke detectors for those areas for increased protection. Such additional areas include: basement, bedrooms, dining room, furnace room, utility room, and hallways not protected by the *required* smoke detectors. *See* NFPA Standard 74, App. B–2.2 (CX 23N).

176. At the same time, fire protection professionals recognize that certain areas in a house, such as kitchens, attics and garages, are not suitable for a smoke detector because these locations occasionally experience conditions which may result in improper smoke detector operation. *See* NFPA Standard 74, B–2.2 (CX 23N). For these reasons, NFPA Standard 74 recommends that the householder consider using, *in addition to smoke detectors required by Standard 74,* additional heat detectors in such areas as kitchen, dining room, attic, furnace room, utility room, basement and garage. For bedrooms, Standard 74

prefers a smoke [57] detector for protection of the occupants from fires in their bedrooms. *See* NFPA Standard 74, App. B–3.1 (CX 23N-O).

177. Neither of respondent's two expert witnesses expressed any disagreement with the 1978 revision of NFPA 74 discussed hereinabove.

178. The consensus among responsible fire protection professionals, as reflected in the revised NFPA 74 discussed hereinabove, is further evidenced by the 35 states in this country which have residential fire detector laws requiring the use of smoke detectors in lieu of heat detectors (Clark 701–02).

VII. THE CLAIM THAT VANGUARD HEAT DETECTORS PROVIDE THE NECESSARY WARNING FOR SAFE ESCAPE IN RESIDENTIAL FIRES IS MISLEADING AND DECEPTIVE UNLESS IT IS COUPLED WITH A DISCLOSURE OF THE MATERIAL FACT THAT HAZARDOUS CONDITIONS MAKING SAFE ESCAPE DIFFICULT OR IMPOSSIBLE WILL DEVELOP BEFORE HEAT DETECTOR ACTIVATION

179. The fact that Vanguard heat detectors will not give necessary warning to allow a safe escape in most residential fires because hazardous conditions of smoke and gases will have developed by the time they activate is a material fact.

180. Therefore, the claim that Vanguard heat detectors are reliable fire warning devices in residential fires are misleading and deceptive unless such a claim also discloses the material information that hazardous conditions of smoke and gases will have developed before detector activation which will hinder a safe escape in most residential fires.

181. It is well-settled that failure to disclose material information may cause an advertisement to be deceptive even if it does not state false claims. *Simeon Management Corp. v. FTC,* 579 F.2d 1137, 1145 (9th Cir. 1978); *Bristol-Myers Co. v. FTC,* 738 F.2d 554, 563 (2d Cir. 1984); *Sterling Drug, Inc. v. FTC,* No. 83–7700, slip op. at 19–20 (9th Cir., Aug. 28, 1984).

VIII. FIGGIE-INTERSTATE'S HEAT DETECTOR DEMONSTRATIONS ARE MISLEADING AND DECEPTIVE

182. The ineffectiveness of heat detectors in most residential fires is explained in large part by the problem of thermal lag and by the physical characteristics of heat movement in a given environment. Heat, unlike smoke, tends to diffuse unevenly through a room (Clark 692–93; Bukowski 1038–39). In the early stages of a fire, the ceiling will absorb about 90% of the thermal energy generated by a fire (Bukowski 1037). Therefore, unless the heat detector is located directly over the point of [58] origin of the fire, activation will be delayed

until air temperature in the entire room has reached the necessary level (Bukowski 1039).

183. For this reason, the cardboard house demonstration (F. 62, *supra*) is misleading. Reasonable consumers will infer from the demonstration that the response time of the Vanguard heat detector during this demonstration is indicative of response time under actual fire conditions. In this demonstration the candle, located about six inches away from the heat detector fuse, generates a hot air flow which is channeled by the cardboard house directly across the fuse element. Under actual fire conditions, it would be completely fortuitous for a heat detector to be located in the direct flow of hot air. Moreover, given the close proximity of the candle and fuse, the heat detector is absorbing significant radiant heat. For similar conditions to occur under actual fire conditions, the heat detector would have to be located directly above the point of fire origin. The most dramatic aspect of the demonstration—activation of the heat detector prior to the tissue burning—is also misleading. Given the fact that the ignition temperature of paper is 450°, the activation of a 136° heat detector before tissue ignites is to be expected. The demonstration merely shows that the detector fuse melts by 450° and no more (Bukowski 1056–57).

184. The *Disneyland Hotel* demonstration, referred to in CX 61 and cited as evidence of heat detector reliability, also does not fairly reflect heat detector performance under actual fire conditions. In this demonstration, a hair dryer was used to blow hot air directly across the surface of a 136° fuse. A measuring device was placed in the air stream to monitor the temperature at activation. Because the efficiency of heat transfer by means of convection is directly proportional to air velocity, the stronger the flow of hot air, the faster the device will activate—even if the temperature of the air flow remains constant. Under actual fire conditions, it is unlikely that the velocity of hot air would approximate the high-speed air flow from a hair dryer. Consequently, CX 61 misleads reasonable consumers to form an impression that heat detectors are reliable in the context of providing the necessary warning for a safe escape in residential fires (Bukowski 1044–46).

185. It is well settled that a determination of false advertising can be based on deceptive visual representations. *Standard Oil Co. of California v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978); *American Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3rd Cir. 1982). And it is within the Commission's expertise to determine what inferences consumers may draw from visual representations. *Sterling Drug, Inc. v. FTC, supra* at 14. **[59]**

IX. THERE IS NEAR UNANIMITY AMONG FIRE PROFESSIONALS THAT AFTER SMOKE DETECTORS ARE INSTALLED OUTSIDE SLEEPING AREAS AND ON OTHER LEVELS OF THE HOUSE, INSTALLATION OF ADDITIONAL HEAT DETECTORS OR SMOKE DETECTORS IN A COMBINATION SYSTEM CAN INCREASE THE LEVEL OF FIRE PROTECTION IN THE HOME

186. The evidence discussed hereinabove clearly and convincingly shows that there is a near unanimity among fire protection professionals as well as fire scientists that installation of a combined system incorporating both smoke detectors and heat detectors, *in addition to* the installation of smoke detectors outside each sleeping area and on each level of the house, can provide increased protection in residential fires.

187. However, a representation that a combined system offers increased or improved level of fire protection is misleading unless it also discloses the material information that any combination system must include smoke detectors outside each sleeping area and each additional story of the house as a minimum.

X. RELIEF

188. The record clearly shows that the principal claim contained in Figgie-Interstate's promotional material discussed herein is that heat detectors will provide the necessary warning to enable occupants to escape safely in most residential fires. Figgie-Interstate promotional materials discussed herein also recommend that a homeowner purchase heat detectors for every major living area of the home in addition to attics, basements, closets, storage areas and garages. And the sales figures showing the disproportionate ratio of smoke and heat detectors sold provide a sound basis for concluding that consumers have in fact acted upon Figgie-Interstate's representations.

189. In the absence of an appropriate order, consumers will continue to suffer substantial economic injury from the purchase of Vanguard heat detectors in the belief that they provide the necessary warning to allow a safe escape in most residential fires. Moreover, to the extent that heat detectors are purchased in lieu of smoke detectors in reliance of respondent's misleading claims, a threat to life safety may be posed.

190. The evidence shows that, although Figgie-Interstate knew or should have known the limitations of heat detector performance, Figgie-Interstate has disseminated and continues to disseminate promotional materials containing false performance claims for Vanguard heat detectors while disparaging smoke detectors. **[60]**

191. In order to prevent further consumer injury and threat to life safety in residential fires, it is necessary and appropriate in this case

to require Figgie-Interstate to cease and desist from making false and deceptive claims in the future that directly or impliedly represent that Vanguard heat detectors will provide the necessary warning to occupants to allow them to escape safely without disclosing the material fact that hazardous conditions of smoke and gases will have developed before heat detector activation in most residential fires.

192. It is reasonable to conclude from the record evidence that consumers purchased Vanguard heat detectors in reliance upon respondent's express and implied claim that heat detectors will provide necessary warning to allow a safe escape in most residential fires and that they will not be able to determine or find out for themselves, until it is too late for them, that hazardous conditions of smoke and gases will develop before a heat detector activates in most residential fires. In order to correct this grave situation involving the life safety of a substantial number of Vanguard heat detector purchasers and their families, it is important that the past purchasers of Vanguard heat detectors be notified of this critical material information, which should have been disclosed to them before they purchased Vanguard heat detectors.

193. Respondent should also be prohibited from misrepresenting the existence of any standards related to residential fire safety devices or systems or the contents thereof, as evidenced by F. 80–82, *supra.* **[61]**

Discussion

1. Respondent's Liability For Misleading And Deceptive Representations

It is true that the Interstate distributors (and their sales representatives), who conducted in-home sales presentations and made the misleading and deceptive representations directly to consumers about Vanguard heat detectors, were not employees or agents of Figgie International, Inc. or its Interstate Engineering Division. Rather, these distributors promoted and sold Vanguard heat detectors under a distributorship contract with Interstate. However, the record is also clear that (1) Figgie-Interstate developed, produced and sold or distributed the promotional materials containing the challenged claims to its contract distributors for the very purpose of promoting and selling Vanguard fire alarm products, including heat detectors, to consumers, (2) it advised and encouraged the use by its contract distributors of the promotional materials in in-home sales presentations, (3) it trained its contract distributors in the use of the promotional materials in in-home sales presentations of Vanguard heat detectors

and (4) it knew of and approved the use of its promotional materials by its contract distributors in in-home sales presentations. In these circumstances, the Section 5 liability of Figgie-Interstate for the deceptive representations made by its distributors to consumers in in-home sales presentations of Vanguard heat detectors is beyond dispute. *See, e.g., National Housewares, Inc., et al.*, 90 F.T.C. 512 (1977).

2. There Is Sufficient Agreement Among Fire Professionals Regarding The Serious Limitations Of Heat Detectors And Respondent Should Be Required To Disclose This Material Information When Promoting Heat Detectors

The evidence shows that a large number of heat detectors have been sold through in-home sales presentations to American householders since the early 1960's and that respondent has been a leader among the sellers of heat detectors in this country. In the course of promoting its fire protection products, respondent and its dealers have been instrumental in making a significant segment of American households aware of the real need for an effective fire protection measure for every home. As a result of respondent's endeavors of many years, a large number of American homes have purchased and relied on, and continue to purchase and rely on, respondent's heat detectors for fire protection. For many years, heat detectors were regarded by fire professionals as [62] an acceptable residential fire warning device either by themselves or in combination with smoke detectors.

However, the situation changed in a fundamental way during the mid–1970's. As the scientific knowledge regarding the behavior of fires increased, a question arose among fire scientists and fire protection professionals as to the relative capability of heat detectors and smoke detectors and the appropriate places for them in a residential fire protection system. These concerns culminated in the 1974 proposal to amend the National Fire Protection Association Standard For The Installation, Maintenance and Use of Household Fire Warning Equipment (often referred to simply as NFPA–74). The proposed amendment sought to eliminate the prior requirement for heat detectors from NFPA–74 and accepted a minimum level of protection consisting of smoke detectors alone in the vicinity of bedrooms and on every other level of the home. And, in order to settle the question as to whether it was necessary to install a heat detector in every room in a home, fire scientists and fire protection professionals, with the cooperation and contribution of fire alarm product manufacturers, designed and conducted a series of residential fire tests known as the Indiana Dunes test during the years 1975 and 1976. The results of

these tests convincingly demonstrated important limitations of heat detectors vis-a-vis smoke detectors, the most important of which being the finding that hazardous levels of smoke, heat and carbon monoxide gas developed before heat detector alarm went off in most tests. After the test results were communicated to NFPA, NFPA–74 was revised in late 1978 so as to incorporate the 1974 amendments. The revised NFPA–74 became the 1980 edition of NFPA–74. In short, in 1978, the NFPA, reflecting the new knowledge and consensus among fire scientists and fire protection professionals, downgraded heat detectors from its former position of a required device to that of an optional and supplemental device acceptable only after the required smoke detectors are in place in a home.

As amply documented in the record, respondent, in the face of the new reality as embodied in the 1978 revision of NFPA–74, sought to continue, and have continued, promoting its heat detectors as an effective household fire alarm devices without disclosing to the consumer the crucial and material information that hazardous levels of smoke, heat or carbon monoxide gas may develop and seriously impede a safe escape before a heat detector alarm goes off in most residential fires. This state of affairs should not be allowed to continue.

It is true, as respondent vigorously contends, that the fire science is an evolving discipline and that the fire test methodology may be further refined as scientific knowledge regarding the behavior of fire and related chemical and physiological factors expands in the future. It is also true that the new consensus regarding the limitations of heat detectors as a residential fire alarm device is not entirely free [63] of thoughtful dissent. However, we know enough to convince us now that heat detectors have serious limitations as household fire protection devices and that respondent should not be permitted to continue as before.

In view of the above discussion, what the Order seeks is not to impose a flat ban on the promotion of heat detectors as household fire protection devices, but merely to require that the important and material information regarding the limitations of heat detectors be communicated to the consumer when promoting heat detectors and similarly that any combination system must include the minimum number of smoke detectors as required by the NFPA–74 (1980).

3. There Is Near Unanimity Among Fire Professionals That Once The Required Smoke Detectors Are Installed, Installation Of Additional Heat Detectors Or Smoke Detectors Can Increase The Level Of Fire Protection In Homes

At the same time, reflecting the universal agreement among fire professionals that installation of additional smoke or heat detectors *after* the required number of smoke detectors are installed can significantly increase the level of fire protection in homes, the revised NFPA–74 accepts additional smoke detectors as an option in a supplementary system. Therefore, respondent should be permitted to promote heat detectors in the future as a component of a combination system provided respondent also discloses to the consumer that any combination must include a smoke detector outside sleeping areas and other levels of the house.

4. Order Provisions

A. *Affirmative Disclosure Requirements*

The Commission's authority to require affirmative disclosure with respect to product performance even when the required disclosure runs counter to the interest of the product advertiser or promoter is well established. *Simeon Management Co.*, 87 F.T.C. 1184 (1976), *aff'd, Simeon Management Co. v. FTC*, 579 F.2d 1137 (9th Cir. 1978). And it is not necessary that a failure to disclose a material fact must be specifically alleged in the complaint as long as the need for an affirmative disclosure requirement is supported by the evidence. *J.B. Williams Co. v. FTC*, 381 F.2d 884, 888 (6th Cir. 1967). **[64]**

In determining the reasonableness of a required affirmative disclosure, the factors to be considered include the existence of health or safety issues (*see American Home Products Corp. v. FTC*, 695 F.2d 681, 714 (3d Cir. 1982)) and the gravity and deliberateness of the violations (*see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *Standard Oil of California v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978)).

B. *Part I of the Order*

A cease and desist order coupled with appropriate affirmative disclosure requirements is imperative in this case in order to effectively prevent continuation of the deceptive performance claims which involve the potential fire safety of a large number of families. Without a clear disclosure of the serious limitations of heat detectors in residential fires, as have been so convincingly shown in recent fire tests and generally recognized by fire professionals, any unqualified effectiveness claim for heat detectors will continue to mislead consumers

into believing that heat detectors can be relied on to give adequate warning for a safe escape for them and their families in case of a fire.

In the disclosure related to a simple effectiveness claim (I A(1)), the language is carefully circumscribed in order to convey the material information which must be conveyed to consumers without unduly frustrating the legitimate promotion of heat detectors by respondent and its contract distributors. It does not require, as complaint counsel propose, that the disclosure statement say "heat detectors will not help you get out of the house in time" or "heat detectors will not protect you from most fires." Instead, it requires a simple and straightforward statement that "dangerous levels of smoke, heat or carbon monoxide gas may develop before a heat detector alarm goes off."

In the disclosure related to a combination system (I A(2)), the language is designed to convey the crucial and material information to the householder that any residential smoke/heat detector combination fire warning system must include a smoke detector outside each sleeping area and on each additional level of a house as required by NFPA–74, without unduly frustrating the legitimate promotion of a supplementary, smoke/heat detector combination system. This provision would leave respondent free to say, for example, that "after you install a smoke detector outside each sleeping area and on each additional story, it is a good idea to install additional heat detectors or smoke detectors in other areas of the house for increased protection" or a variation thereof.

Part I B is necessary to prevent misrepresentations of performance characteristics of heat detectors or smoke detectors **[65]** in any form and to prevent misrepresentations regarding the existence of any standard governing residential fire alarm system, or content of such standard, or compliance of any heat detector with such standards.

Part I C is a broad proscription against heat detector performance claims of any kind not substantiated by competent and reliable scientific evidence.

C. *Part II of the Order*

Part II specifically mandates inclusion of a clear and straightforward affirmative disclosure message in all future promotional material used for heat detectors sold by respondent. This provision is designed to ensure that the disclosure required in I A(1) is included in every heat detector promotional material disseminated by respondent and shown or made available to householders in in-home sales presentations.

Complaint counsel's proposal to require all Interstate dealers and their sales representatives to secure a signed form from every heat

detector purchaser that a required disclosure notice has been furnished and received is rejected. It is my view that such a requirement is unnecessary and unduly onerous.

D. *Part III of the Order*

Part III requires respondent to communicate the required affirmative disclosure to householders who are known to have purchased Vanguard heat detectors since January 1, 1979. It is designed to ensure that the critical limitations of heat detectors are communicated to past purchasers who relied on respondent's misleading performance claims when they purchased heat detectors and continue to rely on such claims as true, thereby leaving themselves and their families with a false sense of safety in the event of a fire. This situation is attributable to respondent's deliberate and continued dissemination of misleading claims for Vanguard heat detectors after the 1978 amendment of NFPA 74, discussed hereinabove (F. 172). And, the record shows that respondent in fact possesses the names and addresses of purchasers of Vanguard heat detectors (F. 19, *supra*). The notification requirement is necessary to effectively remedy the violation found in this case which in a real sense is continuing to this day as regards the past purchasers. *Cf. FTC v. Virginia Homes Mfg. Corp.*, 509 F.Supp. 51, 57 (D. Md. 1981). In these circumstances, equity and concern for life safety in residential fires dictate no less. **[66]**

E. *Part IV Of The Order*

Part IV is designed to promote compliance with this order by all echelons of Figgie-Interstate organization, including its dealers who sell fire alarm products.

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the marketing and promotion of Vanguard heat detectors under Section 5 of the Federal Trade Commission Act.

2. Respondent's use of false, misleading and deceptive statements and representations as herein found is likely to mislead reasonable consumers into believing that such statements and representations were and are true and induce them into the purchase of substantial quantities of Vanguard heat detectors by reason of those mistaken beliefs.

3. In the absence of an appropriate order, the purchasing public is likely to continue to purchase substantial quantities of Vanguard heat detectors because the public believes respondent's statements and representations regarding the capacity of the Vanguard heat

detector to provide the necessary warning for safe escape in most residential fires.

4. The acts and practices of respondent as herein found were and are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

5. The following order is proper and necessary under applicable legal precedent and the evidence in this case. [67]

Order

I.

It is ordered, That respondent, Figgie International, Inc., its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale or distribution of any heat detector or any residential fire alarm system containing a heat detector, as the term *heat detector* is defined by the National Fire Protection Association's Standard 74, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication:

(1) That in the event of a fire, a heat detector (or detectors) will provide the necessary warning to occupants to allow them to escape safely, without also stating that dangerous levels of smoke, heat and carbon monoxide gas will build up before a heat detector alarm goes off in most fires; or

(2) That a heat and smoke detector combination system will provide better [68] or significantly increased fire protection, without also stating that any combination system must have a smoke detector outside each sleeping area and on each additional story of the house, as required by the National Fire Protection Association Standard 74 or by the State.

B. Misrepresenting in any manner, directly or by implication:

(1) The performance characteristics of any heat detector or any residential fire alarm system containing a heat detector including, but not limited to, the capability of the heat detector to provide the necessary warning to occupants to allow them to escape safely in the event of fire; or

(2) The existence or content of any standard or recommendation established or made by the National Fire Protection Association or

any other entity regarding the location, number or type of fire protection devices to be installed in a residence, or [69] compliance of any heat detector or residential fire alarm system containing a heat detector with any such standard or recommendation; or

(3) The performance characteristics of any smoke detectors or any residential fire alarm system containing a smoke detector.

C. Representing in any manner, directly or by implication, the performance characteristics of any heat detector or any fire alarm system containing a heat detector including, but not limited to, the capability of the heat detector to provide fire warning protection, unless at the time of making any such representation respondent possesses and relies upon competent and reliable scientific evidence which substantiates such representation.

II.

It is further ordered, That respondent shall, within 120 days from the date of service of this order, include the following notice in all print advertising or print promotional material for [70] all heat detectors manufactured or sold by respondent or for any fire warning system containing such heat detectors:

CAUTION: In most residential fires dangerous levels of smoke, heat and carbon monoxide gas will build up before the heat detector alarm goes off.

The above-required language shall be printed in a typeface and color which are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page. Nothing contrary to, inconsistent with, or in mitigation of the above-required language shall be used in any advertising or promotional materials.

With respect to any film, video tape, or slide promotional material, the above-required language shall be included both orally and visually within the first minute of the presentation, in a manner designed to ensure clarity and prominence.

III.

It is further ordered, That respondent shall, within 180 days after service of this order, send by first-class mail, to each identifiable purchaser of respondent's fire alarm products since January 1, 1979, the disclosure required by Part II. [71]

Purchasers shall be deemed identifiable if they can be traced using warranty cards or testimonial letters in respondent's possession and/or using sales records maintained by respondent's dealers.

IV.

It is further ordered, That respondent shall distribute a copy of this order to all of its officers and to all employees, agents or representatives having sales or promotional responsibilities with respect to the subject matter of this order. Respondent shall also distribute a copy of this order to each dealer of its fire alarm products.

V.

It is further ordered, That respondent shall maintain documents as will demonstrate compliance with this order for a period of three years from the date the document is created or used, whichever is later. Such documents shall be made available to the Commission or its staff for inspection and copying upon reasonable request and shall include, but not be limited to, the following:

(a) Copies of each nonidentical form of promotional and training materials disseminated by respondent; [72]
(b) The name and last known address of each dealer of respondent's fire alarm products; and
(c) The name and last known address of each purchaser identified under Part IV of this order.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

VII.

It is further ordered, That respondent shall, within 120 days after service upon it of this order, file with the Commission a [73] report, in writing, setting forth in detail the manner and form in which it has complied with this order.

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner:*

I. INTRODUCTION

Figgie International, Inc. ("Figgie") is an Ohio corporation that manufactures and sells a variety of industrial and consumer fire protection, safety and security equipment. Figgie's Interstate Engineering division ("Interstate") markets two different types of "Vanguard" residential fire warning devices: heat detectors[1] (which Interstate manufactures) and smoke detectors[2] (which Interstate purchases from other manufacturers). Interstate sells both types of detectors to independent local dealers, whose salesmen make in-home sales presentation to consumers. From January 1, 1981, through May 31, 1983, Figgie's revenues from sales of Vanguard heat detectors totalled $2,354,000; during the same time period, Figgie's revenue from Vanguard smoke detector sales was $620,000. (CX 127)[3] [2]

On May 17, 1983, the Commission issued a complaint alleging that Figgie had violated Section 5 of the Federal Trade Commission Act. The complaint was amended on November 8, 1983. As amended, Paragraph 5 of the complaint alleges that Figgie represented (1) that its Vanguard heat detectors provide the necessary warning to allow safe escape from most residential fires and (2) that fire alarm systems combining Vanguard heat and smoke detectors provide significantly greater fire warning than smoke detectors alone. Paragraph 6 of the complaint alleges that those representations were unfair and deceptive.

Administrative Law Judge ("ALJ") Montgomery K. Hyun filed his initial decision on October 23, 1984. Judge Hyun found that Figgie's claim that Vanguard heat detectors would provide the necessary warning to allow safe escape from most residential fires was deceptive unless it was accompanied by a disclosure of the fact that dangerous

[1] Vanguard heat detectors are fixed-temperature heat detectors. When the fuse in a fixed-temperature heat detector reaches a certain temperature, it melts and the alarm sounds. Vanguard heat detectors are available with 117° or 136° fuses. Rate-of-rise heat detectors activate when the air temperature increases by more than a certain amount in a certain time period (*e.g.*, more than 15° in one minute).

[2] Vanguard smoke detectors include both photoelectric and ionization detectors. Photoelectric detectors activate when smoke obscures a certain amount of the light transmitted by a light source built into the detector. Ionization detectors detect the presence of particulate matter produced by combustion.

[3] The following abbreviations are used in this opinion:

ID – initial decision
IDF – initial decision finding
Tr. – transcript of testimony
CX – complaint counsel's exhibit
CAP – complaint counsel's appeal brief
CAB – complaint counsel's answering brief
RX – respondent's exhibit
RAP – respondent's appeal brief
RAB – respondent's answering brief

levels of smoke, heat, and carbon monoxide develop before the heat detectors alarm. He also found that any representation that a combination fire alarm system with both heat and smoke detectors provided significantly greater warning than smoke detectors alone was misleading unless it also disclosed that fire protection standards required that a smoke detector be placed outside each sleeping area and on each additional story of the residence. His order prohibits Figgie [3] from making those claims without the specified affirmative disclosures and also forbids misrepresentations of National Fire Protection Association standards, misrepresentations of heat and smoke detector performance characteristics, and unsubstantiated heat and smoke detector performance claims.

Both Figgie and complaint counsel have appealed the ALJ's initial decision to the Commission. Figgie's principal argument on appeal is that the record evidence shows that heat detectors do provide the necessary warning to allow safe escape in most residential fires. Figgie also argues that it was not given adequate notice of matters of fact asserted in the proceeding and that the ALJ's decision is based on theories not alleged in the complaint. Complaint counsel generally agree with the ALJ's decision, but argue that his order should be modified to close certain "loopholes." Complaint counsel also argue that Figgie's distributors should be required to obtain from each heat detector purchaser a signed form acknowledging that the purchaser has seen the affirmative disclosure required by Part II of the order.

This opinion results from the Commission's independent review of the record in this case, including the transcripts of testimony and oral argument, exhibits, pleadings, briefs, and the ALJ's initial decision. The opinion contains findings of fact and conclusions of law that the Commission believes are supported by the preponderance of the evidence on the record as a whole, as required by law.[4] Where the initial decision is inconsistent [4] with the findings and conclusions contained in this opinion, it is set aside. The order issued against the respondent consists of those provisions deemed necessary to prohibit the respondent from engaging in the misrepresentations identified here and to deter the respondent from similar unfair or deceptive practices in connection with any future sales of heat detectors.

II. DID FIGGIE MAKE THE REPRESENTATIONS ALLEGED IN PARAGRAPH 5 OF THE COMPLAINT?

The Commission will find an act or practice deceptive[5] if three

[4] 5 U.S.C. 556(d) (1983); *Steadman v. SEC*, 450 U.S. 91, 95–102 (1981).

[5] Paragraph 6 of the complaint alleges that the representations at issue were unfair as well as deceptive. Since the trial record and the initial decision focus on deception rather than unfairness, this opinion also analyzes the representations in terms of deception. The Commission's deception jurisdiction has been described as a "subset" of our unfairness jurisdiction. *International Harvester Co.*, 104 F.T.C. 949, 1060 (1984); *see also, Southwest Sunsites, Inc.*, Docket No. 9134, slip op. at 103 n. 81 (January 15, 1985) [105 F.T.C. 7], *aff'd*, No. 85–7182 (9th Cir. April 1, 1986). Put another way, unfair practices are not always deceptive but deceptive practices are always unfair.

requirements are met. First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct. Our deception analysis focuses on [5] risk of consumer harm; actual injury to consumers need not be proved.[6]

Before deciding whether Figgie's claims are deceptive, we must first determine whether Figgie's promotional materials make the representations alleged by the complaint.[7]

A. *Figgie's Promotional Materials*

The promotional materials that Figgie supplied its local distributors for use at in-home sales presentations—including a slide show (accompanied by a taped narration), sales brochures and the cardboard demonstration house—make several express representations. [6]

First, the promotional materials point out that anyone could suffer death, injury, or serious property damage from a residential fire. This message was communicated in a particularly dramatic and effective way by the two slide presentations prepared by Figgie.[8] Both versions of the slide show depict houses engulfed in smoke and flames. After reciting some sobering statistics concerning deaths, injuries, and property losses resulting from residential fires, the narrator of the newer show states that fire "can happen to you tomorrow." (Tr. 1589) "Fire can occur in your home," the narrator says later. "Don't believe that a household fire is something that happens only to other people." (Tr. 1590) *The Purpose of My Visit,* a brochure shown to consumers during sales presentations, contains a page headlined "Fire Can Happen To You," which states:

> The chances are that the average family will experience one fire every generation serious enough to have the fire department respond. (CX 67D, 80E)

[6] *International Harvester Co.*, 104 F.T.C. 949, 1056 (1984); *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164–66 (1984). As Commissioner Bailey noted in her Concurring and Dissenting Statement in *Cliffdale,* she believes that a deceptive act or practice is best analyzed as one that has the tendency or capacity to mislead a substantial number of consumers in a material way. While we have followed the analysis used in *Cliffdale,* we agree that respondent's practices in this case were deceptive under either analysis of a deceptive act or practice.

[7] When it examines an advertisement to determine whether the ad does or does not make a particular claim, the Commission often distinguishes express and implied representations. Either type of representation may be deceptive. An express claim is one that is communicated in words or images so plain and unambiguous that virtually every reader or viewer of the advertisement will perceive it. An implied claim may arise from a statement that may be reasonably interpreted in several different ways or from an express claim that leads to an additional inference. In some cases, an examination of the advertisement will allow the Commission to conclude that it makes a particular implied claim; in other cases, surveys, copy tests, expert opinion, or other extrinsic evidence that it is reasonable to interpret the ad as making the implied claim will be necessary. *Thompson Medical Co.*, 104 F.T.C. 648, 788–90 (1984).

[8] The original slide show (CX 129–31) was replaced by a newer version (CX 132–33, Tr. 1586–1604) in 1983. (CX 135, Admission No. 59)

Next, the promotional materials emphasize the importance of early fire detection and warning. As the slide show narrator says, "Authorities say there are two things necessary to save you and your family in case of fire. The first is adequate warning." (Tr. 1589–90) "[T]he real killer is time. If every family were warned of the fire in time, nighttime fire deaths and injuries could be virtually eliminated." (Tr. 1597–98) [7]

> Imagine if an early warning system existed for your car that could warn you minutes before a fatal crash. We would all want one. A system like that of course does not exist. Yet, an early warning system does exist that will warn you minutes before a fatal fire condition exists in your home. (Tr. 1599)

What is that "early warning system"? According to one Figgie brochure, "the only way to provide complete and sure fire-warning protection is by using smoke detectors and heat detectors." (CX 63) According to another, *The Best Way* to protect yourself is "The Vanguard Combination System," which incorporates both smoke and heat detectors. (CX 71Z–12) According to a third, *If You're Serious About Fire Protection, Install Vanguard, The Reliable Combined Fire Protection System.* (CX 69A) Together, Vanguard heat and smoke detectors are "the combination needed to give a greater measure of life safety." (CX 69C)

Why are heat detectors as well as smoke detectors necessary? Figgie's promotional materials offer three different answers to that question.

First, many residential fires start in kitchens and other rooms "which occasionally experience conditions which may result in improper operation" of smoke detectors. (CX 70B) For example, "smoke detectors should not be installed near kitchens" because "fairly routine cooking occurrences" will cause them to activate. (CX 69C) Vanguard heat detectors provide "immediate early warning" of fires in these areas. (CX 69C)

Second, heat detectors are more reliable and dependable because they are maintenance-free and mechanically rather than electrically operated. According to another Figgie sales [8] brochure, a 1980 test of 175 Vanguard heat detectors that had been installed in the Disneyland Hotel twenty years earlier proved the "long-term dependability" of these detectors, which "do not require maintenance." (CX 61C) Unlike smoke detectors, the Vanguard heat detector "does not rely on electricity or batteries and has no electronic parts to fail." (CX 68B) Also, "[s]moke detectors are vulnerable to dust, lint, invisible grease vapors, unseen insects, corrosion, and varying climactic conditions that can . . . render them ineffective." (CX 68B-C)

Third, "heat detectors are essential . . . to guard against the many types of fires where smoke detectors may be ineffective." (CX 68B)

Safe At Home, the Vanguard owner's manual and warranty book, explains that "[t]here are two extremes of fire to which household fire warning equipment must respond. One is the rapidly developing, high heat fire. The other is the slow, smoldering fire." (CX 66F) Vanguard heat detectors provide "fast response to hot fires" (CX 71Z–12) that "generate heat but little smoke until it is too late for escape." (CX 68B-C) To demonstrate how quickly Vanguard heat detectors responded to hot fires, Vanguard salesmen used a cardboard demonstration house.[9] First, the salesman put a lighted candle inside the small demonstration "house," which had four walls but no roof. After placing a piece of tissue on top of the house, the salesman held the heat detector just above the tissue [9] "roof." The heat detector usually alarmed before the tissue was even scorched.

Finally, Figgie's promotional materials clearly represent that heat detectors contribute more to residential fire safety than do smoke detectors. While both heat and smoke detectors should be installed, "Heat Detectors Have Probably Saved More Lives And Property Than Any Other Fire Detection Device." (CX 63) One brochure states that kitchen fires account for 65% of household fires. (CX 69C) Another contains a graph showing that 569 of 992 (57.2%) fires of known origin that resulted in Vanguard fire alarm activations started in kitchens and other areas where installation of smoke detectors is not recommended. (CX 70B, E) It also states that 734 of 1107 (66.2%) reported activations were the types of fires that "might be responded to best by heat detectors." (CX 70B) The original slide show presentation portrayed a demonstration fire in which three heat detectors gave quicker warning than a smoke detector. (CX 130M) Illustrations showing where Vanguard detectors should be installed always indicate more recommended locations for heat detectors than smoke detectors. (CX 66O, 67Q) Figgie's sales brochures usually depict a combination system consisting of five heat detectors and one smoke detector. (CX 61H, 67P, 69A, 70G, 71Z–13, and 80Q).

B. *Did Figgie Claim That Vanguard Heat Detectors Provide The Necessary Warning To Allow Safe Escape From Most Residential Fires?*

The ALJ concluded that Figgie did represent, as alleged in Paragraph 5(1) of the complaint, that "[i]n the event of most fires, [10] respondent's heat detectors provide the necessary warning to occupants to allow them to escape safely." We agree that consumers reasonably would have interpreted Figgie's promotional materials as

[9] Although this demonstration house (CX 81) was designed and first used in sales presentations by a Vanguard distributor in Houston, Figgie then offered all Vanguard distributors the house and a suggested script for salesmen to follow when performing this demonstration. (CX 88)

making that claim.[10]

That alleged representation can be thought of as two separate but closely related representations. The first is that Vanguard heat detectors provide enough advance warning for safe escape from at least some fires; in other words, that Vanguard heat detectors are effective residential fire warning devices. The second is that Vanguard heat detectors are effective fire warning devices in most residential fires, not just in rare or unusual situations.

The first claim is implied by the mere offering for sale of Vanguard heat detectors as residential fire warning devices. It is made expressly in statements that "thousands of lives [have been] saved" (CX 71Z–12) by Vanguard heat detectors, which provide "fast response to hot fires" (CX 71Z–12), "immediate early warning" and "reliable, service-free, long-lasting protection." (CX 69C) It is also expressly present in the statement that the Vanguard combination fire protection system, which incorporates both heat and smoke detectors, is an "early warning system . . . that will warn you [11] minutes before a fatal fire condition exists" (Tr. 1599) and by the numerous other representations of the virtues of the combination system discussed above.[11]

The second part of the representation alleged by Paragraph 5(1)—that Vanguard heat detectors provide the necessary warning in most fires—is explicit or implicit in several claims quoted above. For example, one Figgie brochure states that 734 of 1107 (66.2%) reported fires that resulted in activation of a Vanguard fire warning device were of the type that "might be responded to best by heat detectors." It also states that over 57% of those reported fires that were of known origin started in kitchens and other areas where smoke detectors should not be installed. (CX 70B) The implication of the second statement is that heat detectors provided the necessary warning for safe escape in at least 57% of those fires.

Figgie argues correctly that its promotional materials do not represent that Vanguard heat detectors will provide the necessary warning to all occupants of a residence "no matter . . . what type of fire occurs" or "under all circumstances." (RAB 19) But the complaint contains no allegation of such a representation. It alleges only that Figgie represents that its heat detectors are effective "in the event of *most* fires" (emphasis added). [12]

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[10] Our conclusion is based on our own examination of Figgie's promotional materials. We note, however, that our conclusion is corroborated by complaint counsel's expert witness, Dr. Cohen, whose testimony is the only extrinsic evidence on the record of how consumers would interpret Figgie's promotional materials. (Tr. 303)

[11] The Vanguard combination system comprises two different subsystems: one designed to detect abnormally high heat, the other designed to detect smoke. Neither subsystem's operation is dependent upon the other. Therefore, a claim for the combination system generally is really a claim for each subsystem.

C. *Did Figgie Claim That Its Combined System of Heat Detectors and Smoke Detectors Provides Significantly Greater Fire Warning Protection Than Smoke Detectors Alone?*

The ALJ also found that Figgie did represent, as alleged in Paragraph 5(2) of the complaint, that its "fire alarm systems combining heat detectors and smoke detectors provide significantly greater fire warning protection for occupants than smoke detectors alone." Again, we agree.[12]

This representation is made expressly in a number of Figgie's promotional materials. For example, the owner's manual and warranty book states:

> The "Vanguard Thermosonic" Heat Detector is designed to detect abnormally high temperatures. The "Vanguard Smokesonic" Smoke Detector is designed to detect abnormal quantities of smoke. Every fire warning system for homes should include both heat detectors and smoke detectors, properly applied, and located in accordance with their best usage. (CX 66F)

The original version of the slide show presentation tells the story of one fire victim who learned too late that "to have adequate protection the home must have heat detectors as well as smoke detectors." (CX 130C) A Figgie sales brochure claims that a "systematic combination" of heat and smoke detectors is needed "to maximize chances for fire survival," and that "people who have depended only on smoke detectors . . . have been injured and died as a result of fire." (CX 68B, C) [13]

As described in Section II.A. above, Figgie's promotional materials offer three reasons why heat detectors are needed in addition to smoke detectors. First, heat detectors provide "immediate early warning" of fires that start in kitchens and other areas where the installation of smoke detectors is not recommended. (CX 69C, 70B) Second, heat detectors are more reliable because they "do not require maintenance" (CX 61C) and "[do] not rely on electricity or batteries." (CX 68B) Third, heat detectors provide "fast response to hot fires" (CX 71Z–12) that "generate heat but little smoke." (CX 68B-C)

III. WERE FIGGIE'S CLAIMS MATERIAL?

Having concluded that Figgie made the representations alleged in the complaint, we must next decide whether those representations were material. A material representation is one that is likely to affect a consumer's choice of, or conduct regarding, a product or service because it involves some characteristic of that product or service that

[12] Complaint counsel's expert, Dr. Cohen, came to the same conclusion. (Tr. 303) Figgie does not contest that it made this representation. (RAP A–8, No. 79)

is important to consumers.[13]

The two representations that are alleged in the complaint here are presumed material for two reasons. First, express claims are presumed material.[14] Second, claims that concern the central characteristics of the product or service are presumed [14] material.[15] Both of these representations concern the single most important characteristic of the Vanguard heat detector: its effectiveness as a fire warning device. The first representation is that Vanguard heat detectors give enough warning of most fires to allow safe escape. The second representation is that a fire warning system incorporating Vanguard heat detectors provides significantly more protection than one that does not. It is hard to imagine that any consumer who was considering the purchase of a fire warning device would not find those two performance claims—one absolute, the other relative—extremely material.[16] The Commission will always consider relevant evidence offered to rebut such presumptions of materiality, but Figgie has offered no such evidence here. We conclude that the representations at issue are material.

IV. WERE FIGGIE'S CLAIMS LIKELY TO MISLEAD CONSUMERS?

Having concluded that the representations made by Figgie were material, we must next determine whether those claims were likely to mislead consumers. Some representations are deceptive because they are false. Other representations are deceptive because qualifying information needed to correct misimpressions created by the representations is omitted. Even silence can be [15] deceptive if the circumstances are such that an implied but false representation is communicated.[17]

The ALJ found that both the representations at issue here were deceptive because Figgie failed to disclose certain qualifying information. We agree with some of his findings, but disagree with others.

A. *The Evidence Presented By Complaint Counsel*

Complaint counsel base their allegations that heat detectors neither provide the necessary warning to allow escape from most fires nor provide significantly greater protection when used in combination with smoke detectors on the results of several fire detection

[13] *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 165 (1984).

[14] *International Harvester Co.*, 104 F.T.C. 949, 1057 (1984).

[15] *Id.*

[16] Figgie sells four to five times as many heat detectors as smoke detectors (CX 125, 127A), which indicates that those claims are persuasive.

[17] For example, the very act of offering goods for sale creates an implied representation that the goods are reasonably fit for their intended uses and free of gross safety hazards. Silence in circumstances that create no implied representations—often termed a "pure omission"—is not deceptive although it may be unfair. *International Harvester Co.*, 104 F.T.C. 949, 1057–60 (1984).

device test programs and on the testimony of three experts on fire science and fire detection devices.

1. The California Fire Chiefs' Tests

The 1978 California Fire Chiefs' Association Residential Fire Detector Test Program is the most relevant of those fire detection device tests because it tested the performance of Vanguard heat detectors directly. The objective of the "Cal Chiefs' Tests," which were jointly sponsored by the California Fire Chiefs' Association and the Los Angeles City Fire [16] Department, was "to investigate and report on residential fire detector response, reliability, and life safety potentials under realistic conditions (*i.e.*, uncontrolled fire development in actual dwellings)." (CX 10) The tests were funded by contributions from the International Association of Fire Chiefs, local and state government agencies, and a number of fire detection device manufacturers, including Figgie's Interstate Engineering division. Interstate's chief engineer, Mr. Gallagher, was a consultant to the test program's planning committee. (CX 1L)

One of the houses used in this series of tests was a one-story, three-bedroom dwelling with a typical central hall floor plan. The other test house was a two-story dwelling with basement. The houses were completely furnished with furniture, carpets, drapes, curtains, books, and bedcovers during the tests. After each test fire, the structure was restored to its original condition and refurnished before the next test fire was set. (CX 1Q-R)

Fifty-six fire detectors were installed in the one-story test house and 64 in the two-story house. The detectors were arranged in eight-detector panels. Each panel consisted of three ionization smoke detectors, three photoelectric smoke detectors, and two fixed-temperature heat detectors, one of which was always a Vanguard 136° heat detector. Locations of the detector panels in the one-story test house included the living room, two bedrooms, hall, kitchen, attic and furnace room. In the two-story test house, panels were placed in those seven locations and [17] also in the dining room. At each test site, an adjacent house was used as a "command center." Each detector was wired to a clock in the command center. The clock stopped when the detector first alarmed. An oscillograph recorded the complete operational cycle of each detector. (CX 1V-W)

Temperature-measurement devices known as thermocouples were installed at five different heights in each room where detectors were placed. Environmental gas sampling equipment was used to measure levels of oxygen, carbon monoxide, and carbon dioxide at five locations: two bedrooms, the hall (or the upstairs landing in the two-story house), kitchen, and living room. Smoke obscuration—that is, the

reduction in light transmission caused by the presence of smoke—was measured by a light beam aimed at a photoelectric cell. Four such beams were used: one in each of two bedrooms, the entry way and the hall (or the upstairs landing in the two-story house). In addition, videotape recorders with time and date generators were used to film each test. Sound level measurements were also taken to determine the loudness of the alarm sounded by each detector throughout the house. (CX 1V-Z4)

Eleven test fire scenarios were developed based upon the California State Fire Marshall's "California Fire Incident and Reporting System" statistics on fatal fires.[18] "Flaming" fire scenarios included cotton fabric placed against a wall heater, a [18] lighted candle placed under clothing in a closet (to simulate a child playing with matches in a closet), an overheated coffeemaker under kitchen cabinets and gasoline in a garage ignited by a water heater. "Smoldering" fire starts were represented by a lighted cigarette on a living room couch, a cigarette on a bed, cooking oils on a kitchen stove, overheated electrical wire under carpeting, an overheated motor in a forced air unit and overheating in a gas-fired wall furnace. Each scenario was repeated a number of times in each test house under varying conditions. For example, one test of each scenario was conducted with bedroom doors and windows open and the heater off. (CX 1R-U) Each test fire was allowed to develop at its own rate. Data was collected until the fire self-extinguished, all the detectors activated or certain extreme temperatures or atmospheric conditions were reached.[19] (CX 125) A total of 71 test fires were set, and over two million pieces of data were recorded. (CX 128)

Evaluation of detector performance was based on the amount of "escape time" each detector provided—in other words, how long before certain hazardous conditions developed did the detector activate? Smoke detectors usually provided two to six minutes escape time before any of the hazardous conditions, or [19] "tenability limits," developed.[20] Heat detectors never gave more than 1.3 minutes escape time; in 92% of the test fires, the earliest-sounding heat detector alarmed after one or more tenability limit was exceeded. (Tr. 815–16) In one test fire, the earliest-sounding heat detector and earliest-sounding smoke detector activated at the same time. But in every other test fire, the first detector to sound a warning was a smoke detector. (Tr. 879)

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[18] At the request of Interstate's chief engineer, a relatively large number of kitchen fires were also included although kitchen fires rarely result in fatalities. (Tr. 762)

[19] For example, the test was terminated if the air temperature in the room where the fire started reached 500° or the carbon monoxide level reached one percent.

[20] As defined for the tests, tenability limits were a temperature of 150° F., 1000 parts per million (ppm) carbon monoxide or smoke obscuration of 11% per foot (*i.e.*, smoke that is dense enough that 11% of the amount of light coming from a source such as a lamp or a window is obscured one foot away from that source). (Tr. 817)

2. The Indiana Dunes Tests

The Indiana Dunes Tests, designed and administered by the National Bureau of Standards and Underwriters' Laboratories in 1974–76, were also conducted in actual homes under conditions that closely simulated those that would exist in typical residential fires. (Tr. 967–70) The testing methodology was generally similar to that used in the Cal Chiefs' Tests. (Tr 971–72) Tenability limits were set at 150°, 400 ppm carbon monoxide and smoke obscuration of 15% per foot. (Tr. 985) [20]

In the first series of tests ("Dunes I"), smoke detectors and rate-of-rise heat detectors were tested. Thermocouples were used as surrogates for fixed-temperature heat detectors.[21] (Tr. 980) In each of the 37 Dunes I test fires, the first detector to sound an alarm was a smoke detector. The earliest-sounding smoke detectors provided an average escape time of 18.6 minutes, but the earliest-sounding thermocouples provided an average escape time of negative 2.2 minutes. In other words, the first thermocouples to alarm in the 37 test fires sounded an average of 2.2 minutes after one of the tenability limits was exceeded. (Tr. 986–88)

In response to criticism of "Dunes I" from Interstate's chief engineer, Vanguard heat detectors were tested directly in a second series of tests ("Dunes II"). The Vanguard heat detectors used in Dunes II, however, performed "considerably poorer" than the thermocouples used in Dunes I. (Tr. 990) For example, the thermocouples gave three minutes or more escape time in five of [21] 37 Dunes I test fires, but Vanguard heat detectors never provided as much as three minutes escape time in 22 Dunes II test fires. (Tr. 991–92)

3. Expert Testimony

Based on the results of the Cal Chiefs' Tests, the Indiana Dunes Tests and other tests of fire detection devices, complaint counsel's three experts on fire science and fire detection devices agreed that heat detectors sounded after the development of hazardous conditions in most residential fires.

According to Mr. Clark, a member of the staff of the National Fire Academy of the Federal Emergency Management Agency, the consensus among fire service professionals is that "[h]eat detectors do not

[21] Thermocouples measure temperature and transmit temperature readings continuously. When the Dunes I data was analyzed, it was assumed that a Vanguard 136° heat detector would have activated at the same time that the thermocouple reading reached 136°. In fact, the Vanguard heat detector would probably have alarmed some time after the thermocouple indicated 136° because, unlike the thermocouple, the Vanguard heat detector would have been affected by "thermal lag." When a frozen dinner is taken from the refrigerator and placed in a preheated oven, quite a bit of time will pass before the dinner absorbs enough heat to reach the same temperature as the air in the oven. Similarly, in the event of fire, a 136° heat detector does not alarm as soon as the air temperature reaches 136°. By the time the heat detector fuse absorbs enough heat to reach 136°, the ambient temperature will have risen considerably above that temperature. (Tr. 977–79)

supply early warning to fires." (Tr. 699) He testified that "[t]he literature indicates that in terms of heat detectors, the occupants would not have enough time to evacuate their home because their exit paths would become untenable either due to smoke, carbon monoxide, or even the heat levels." (Tr. 699) He also testified that "in terms of life safety . . . it doesn't make any difference if you have . . . heat detectors" in addition to smoke detectors; "in terms of property protection," he added, "it may make a difference to have those additional heat detectors." (Tr. 712)

Mr. Martin, a Los Angeles Fire Department fire protection engineer who was the assistant site director for the Cal Chiefs' Tests, said that "Vanguard heat detectors do not give sufficient warning . . . to the occupants of a house to escape during a [22] fire." (Tr. 880) He also testified that "a combination of the heat detectors and smoke detectors do not give you significant additional alarm over smoke detectors alone." (Tr. 880)

Mr. Bukowski, a National Bureau of Standards research engineer who helped design and administer the Indiana Dunes Tests, concluded that heat detectors "just don't appear to be effective." (Tr. 1005) According to him, the fire detector test results indicate that "smoke detectors provide adequate escape time in many, many more of the cases and in fact that the heat detectors provided very little in the way of escape time and warning." (Tr. 1009) In other words, "in most fires life-endangering conditions typically occur prior to the activation of heat detectors and activation of smoke detectors generally occur prior to the occurrence of life-endangering conditions." (Tr. 1013–14) He testified that it was generally not necessary to supplement smoke detectors with heat detectors, and that installing heat detectors in attics, garages, and other areas where smoke detectors could not be installed gave a "marginal at best" increase in protection. (Tr. 1058)

B. *The Evidence Presented By Figgie*

Figgie's defense to complaint counsel's allegations is based on the Underwriters' Laboratories listing of Vanguard heat detectors, the National Fire Protection Association's Standard 74, Vanguard purchaser testimonials and the testimony of two experts on fire detection devices. [23]

1. The Underwriters' Laboratories Listing of Vanguard Heat Detectors

Underwriters' Laboratories ("UL") is a well-known organization that establishes product standards, tests various products and gives a UL listing to those products that meet its standards. Vanguard heat detectors have been tested by UL and listed as meeting UL's standard

for heat detectors, UL–539. (Tr 1285–87) Figgie argues that the UL listing demonstrates the effectiveness of Vanguard heat detectors. (RAP 9)

2. The National Fire Protection Association's Standard 74

The National Fire Protection Association ("NFPA") is an independent standard-setting organization that establishes model fire protection codes. Many state and local government regulations incorporate NFPA's code provisions. NFPA Standard 74, which sets standards for household fire warning equipment, discusses the proper installation, maintenance and use of both smoke and heat detectors. Appendix B to the 1980 edition of Standard 74 states that "areas lending themselves to protection with heat detectors are: kitchen, dining room, attic (finished or unfinished), furnace room, utility room, basement, and integral or attached garage." (CX 23N-O) Figgie argues that the discussion of heat detectors in this standard implies that NFPA recognizes heat detectors as effective residential fire warning devices. (RAP 9–10) **[24]**

3. Consumer Testimonials

Five Vanguard heat detector purchasers testified that those heat detectors supplied them with the warning necessary to prevent or escape safely from fires in their residences. The record also includes dozens of letters from Vanguard heat detector purchasers attesting to the effectiveness of those heat detectors as fire warning devices and a description of 1107 Vanguard heat detector activations between 1959 and 1980 that is based on purchaser testimonial letters. (CX 72, 70)

Figgie argues that "[t]he record contains no evidence of a single instance in which a Vanguard heat detector failed to provide the necessary warning to allow a safe escape" from a residential fire. (RAB 4) Both Figgie's and complaint counsel's experts testified that they were unaware of any such incident. (Tr. 722, 900, 1536–37, 1702)

4. Expert Testimony

Figgie's experts on fire detection devices testified that heat detectors are effective fire warning devices and that a combination fire warning system incorporating heat and smoke detectors offers more protection than smoke detectors alone.

Mr. Ward, the Springfield, Illinois, Commissioner of Public Health and Safety, disagreed with complaint counsel's expert testimony that heat detectors do not provide the necessary warning in most residential fires (Tr. 1715–16) and that the combination of heat and smoke detectors do not provide **[25]** significantly greater warning than

smoke detectors alone (Tr. 1717). He testified that heat detectors are "extremely reliable" devices that "can and do provide the necessary warning" (Tr. 1702) and that "the combination of smoke and heat [detectors] serves probably the best interests of protecting those who are residents in structures for normal habitation." (Tr. 1703)

Mr. Lee, the retired Chief of the Charlotte, North Carolina, Fire Department, testified that a combination of heat and smoke detectors has two advantages over smoke detectors alone. First, heat detectors function better in "the kitchen, garage, a utility room, a furnace room, or in areas where the temperature gets extremely high or low." Second, "there is a reliability factor due to the mechanical makeup of a heat detector that provides a backup . . . in the event of the failure of a smoke detector through a power failure or battery failure or what have you." (Tr. 1525)

C. *An Evaluation Of the Record Evidence*

1. Does The Evidence Demonstrate That Vanguard Heat Detectors Provide The Necessary Warning To Allow Safe Escape From Most Residential Fires?

After a careful review of the evidence introduced by both parties, we conclude that the most probative evidence on the issue of whether heat detectors provide the necessary warning to allow safe escape in most residential fires is found in the [**26**] results of the Cal Chiefs' and Indiana Dunes tests (and the expert testimony concerning those results).

Both sets of tests were designed and administered by expert professionals working on behalf of respected fire protection organizations, private testing laboratories and government agencies. The test fire scenarios closely resembled actual residential fire situations. Elaborate scientific instrumentation was used to collect millions of individual data concerning the environmental conditions produced by the test fires and the performance of the fire detection devices being tested. The data were carefully analyzed, and detailed reports describing those analyses were published. These reports are considered reliable authority by residential fire protection experts and have resulted in numerous revisions to state and local regulations setting minimum standards for residential fire detection devices. (Tr. 701–02)

As discussed above, the Cal Chiefs' and Indiana Dunes tests show that smoke detectors provide significantly earlier warning of potentially dangerous conditions resulting from a residential fire than do heat detectors. More importantly, heat detectors often provide no advance warning at all. In the Cal Chiefs' Test, for example, the earliest-sounding heat detector alarmed after a tenability limit was

exceeded in 92% of the test fires. We agree with the expert witnesses who concluded that these tests demonstrate that heat detectors do not provide the necessary warning to allow safe escape in most residential fires.[22] (Tr. 699, 880, 1013–14) Figgie's experts disagreed with that [27] conclusion, but we give their opinions little weight because we do not believe that their opinions were adequately supported.[23]

Figgie offers several criticisms of the methodology used in those testing programs. First, Figgie points out that these tests involved fires in unoccupied houses and argues that the conclusions drawn from such tests are necessarily based on unrealistic assumptions about what would have happened if people had actually been present during those fires. While the Cal Chiefs' and Indiana Dunes test fire scenarios were carefully designed to resemble actual residential fire circumstances as closely as possible, it is true that the fire experts who analyzed the data from those tests had to make assumptions about the effects on humans of certain levels of smoke, heat, carbon monoxide and other environmental conditions. Since no responsible researcher would expose human subjects to the dangers of fire for the purposes of an experiment, any residential fire test must be based on such assumptions. The real issue, therefore, is whether the particular tenability limits chosen by the Cal Chiefs' and Indiana Dunes researchers are reasonable indicators of conditions that could result in serious injury or death. [28]

Figgie argues that the tenability limits used to evaluate heat and smoke detector performance were too conservative. According to Figgie, the test methodology assumed "that people in their own homes will remain still and die in a fire rather than attempt escape through a temperature of 150° Fahrenheit . . . or . . . through smoke in which visibility is obscured beyond ten feet." (RAP 13)

It is true that limited exposure to 11% or 15% smoke obscuration or 150° heat does not necessarily cause death or serious injury. The record, however, contains evidence that such conditions can seriously impede escape. For example, one expert testified that smoke has physiological and psychological effects that make a successful escape less likely. Smoke irritates the eyes, nose and throat, and makes breathing difficult. Smoke also obscures vision, causes disorientation and induces panic. (Tr. 679–80) One study of the effects of smoke obscuration found that blindfolded subjects walked through a smokeless corridor faster than non-blindfolded people walked through the same corridor after a 15% smoke obscuration level had been created.

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[22] The Vanguard heat detectors that were tested were equipped with 136° fuses. Recently, Interstate began to offer 117° heat detectors for sale. It is reasonable to assume that the 117° heat detectors provide earlier warning than 136° heat detectors, but analysis of the Indiana Dunes Tests data indicates that the improvement in performance from the substitution of 117° fuses would likely be marginal at best. (Tr. 1040)

[23] *See Thompson Medical Co.*, 104 F.T.C. 648, 790 n. 11 (1984).

(Tr. 1000–02) And while humans may be able to tolerate a constant 150° temperature under carefully controlled conditions, fire temperatures can increase rapidly once 150° is reached. According to one expert, a residential fire burning at 150° could be 700° (or even hotter) only ten seconds later. (Tr. 931) While some people might escape if given warning after smoke [29] or temperature levels exceeded these tenability limits, it is reasonable to assume that many others would suffer death or serious injury.

Figgie also argues that the evidence it introduced concerning the performance of Vanguard heat detectors in actual residential fires deserves more weight than evidence of performance in test fires. The Cal Chiefs' and Indiana Dunes tests indicate that heat detectors provide the necessary warning in very few fires. While the limited anecdotal evidence from Vanguard purchasers introduced by Figgie may prove that Vanguard heat detectors have sounded warnings early enough to allow escape from some residential fires, it says nothing about whether Vanguard heat detectors provide the necessary warning in most fires. We conclude that the reports of successful heat detector performance introduced by Figgie, which may be representative only of relatively unusual situations, do not deserve as much weight as the Cal Chiefs' and Indiana Dunes findings. [30]

Neither the Underwriters' Laboratories listing of Vanguard heat detectors nor the mention of heat detectors in National Fire Protection Association Standard 74 prove that Vanguard heat detectors provide the necessary warning in most fires. As a former UL testing engineer testified, UL tests "are not intended to demonstrate the performance of any kind of detection device under real fire conditions." (Tr. 1029) In the UL "water bath test," a heat detector is immersed in water. The temperature of that water is increased one degree per minute until the heat detector's alarm sounds. This test determines whether the fuse of a heat detector melts at or near its stated temperature but says nothing about whether that heat detector gives the necessary warning in most residential fires, because, among other things, it avoids the problem of thermal lag.

The UL "oven test" demonstrates that heat detectors are subject to thermal lag. In that test, a heat detector is placed in a circulating air oven. The temperature of the air in the oven is then raised from 80° to 240° at a rate of 40° per minute. In one series of oven tests, Vanguard heat detectors with 136° fuses did not activate until the oven temperature reached 185° to 200°—or well over a minute after the oven temperature reached 136°. (Tr. 1025) Since actual residential [31] fire temperatures can rise much more rapidly than 40° per minute, the temperature at which the detector would alarm in a real

fire could be hundreds of degrees higher.[24]

In the UL "fire test," two nine-square-foot pans of alcohol are ignited and the response time of the heat detector is noted. The temperature in the test room at the time the heat detector's alarm sounds is not recorded, but it can be assumed from the amount of thermal energy generated by such a fire that the temperature would be extremely high. The fact that a heat detector alarms when subjected to such extreme conditions does not necessarily indicate that it will provide enough warning for safe escape from most residential fires.

NFPA Standard 74 sets standards for the installation, maintenance and use of residential fire warning equipment. Both heat detectors and smoke detectors are discussed in Standard 74, but only smoke detectors are required under this standard. Section 2–1.1.1 states that "[s]moke detectors shall be installed outside of each separate sleeping area . . . and on each additional story of the family living unit." (CX 23F) A footnote to that section recommends that residents "consider the use of additional smoke or heat detectors for increased protection for those areas separated by a door from the areas protected by the required smoke detectors." (*Id.*) And Appendix A to the standard says that "this standard utilizes smoke [32] detectors as the primary life protection equipment" because "detectable quantities of smoke precede detectable levels of heat in nearly all" residential fires. (CX 23K) The mere mention of heat detectors in NFPA Standard 74 does not prove that heat detectors provide the necessary warning for safe escape in most residential fires.

The preponderance of the evidence on the record demonstrates that Vanguard heat detectors do not provide the necessary warning to allow safe escape from most residential fires. Therefore, we conclude that Figgie's representations that Vanguard heat detectors did provide such warning are deceptive.

2. Does The Evidence Demonstrate That A Fire Alarm System Combining Heat and Smoke Detectors Provides Significantly Greater Fire Warning Protection Than Smoke Detectors Alone?

As discussed in Section II.A. above, Figgie claimed that a combination fire alarm system combining heat and smoke detectors provides significantly greater fire warning protection than smoke detectors alone for three reasons. First, according to Figgie, heat detectors will provide early warning of the many residential fires that start in kitchens and other rooms where the installation of smoke detectors is not recommended. Second, heat detectors are more reliable than smoke detectors because they are maintenance-free devices that do

[24] One expert witness told of one test fire in which the temperature reached 1000° before a heat detector located in the room where the fire was set alarmed. (Tr. 696–97)

not operate on electricity or batteries. Third, heat detectors respond more quickly to hot, flaming fires. [33]

The ALJ considered these three distinct claims, each of which is made expressly in Figgie's promotional materials, as one general claim of superiority and concluded that a combined system "can provide increased protection." (IDF 186) We believe it is preferable to evaluate each claim individually.

a. *Heat Detectors May Provide Additional Protection That Some Consumers Would Consider Significant In Areas Where Smoke Detectors Should Not Be Installed*

Certain areas in the house are not suitable locations for smoke detectors. Cooking smoke, automobile exhaust and other atmospheric contaminants or extremely high or low temperatures can cause false alarms in such areas. (Tr. 1525) As NFPA Standard 74 says, "[t]he installation of smoke detectors in kitchens, attics (finished or unfinished), or in garages is not normally recommended as these locations occasionally experience conditions which may result in improper operation." (CX 23N)

Two experts, however, testified that relatively few fatal fires originate in those areas. (Tr. 763, 1059) For example, only about 0.6% of the deaths and 2.2% of the injuries caused by fires in 1981 resulted from residential garage fires. (CX 28K) Also, smoke detectors located in other parts of a house might give earlier warning of a fire that starts in a kitchen, attic, or garage than a heat detector in the kitchen, attic or garage itself. (Tr. 696–97, 724, 1059) Therefore, it is reasonable to [34] assume that the installation of heat detectors in those areas where smoke detectors are not recommended will provide additional protection from death or serious injury in only a relatively small number of residential fires. As one expert testified, the additional protection provided by such heat detectors is "marginal at best." (Tr. 1058)

That is not to say, however, that a slightly better level of fire protection is not significant. As used in the complaint, "significant" simply means "important" or "meaningful." Whether a slightly better level of protection is significant may depend on the seriousness of the harm that could result if the protective device failed to operate. Even a very small amount of additional protection from death or serious injury caused by fire would no doubt be considered significant by some consumers. The record in this case contains no testimony or survey evidence on how much additional protection from fire-related death, injury or property loss would be considered significant by consumers. Complaint counsel have failed to prove that the additional protection is not significant.

The statement concurring in part and dissenting in part states that the expert testimony and test data introduced at trial establish that heat detectors in kitchens, garages, and attics provide "virtually no" additional protection because smoke detectors "almost always" alarm earlier than heat detectors "regardless of their respective locations." First, the partial dissent cites the results of the 1969 Bloomington, Minnesota, fire tests. In one of those test fires, a kitchen fire caused [35] the smoke detector in the adjacent hallway to alarm before the heat detector in the kitchen itself. It would be unwise to draw any conclusions from the results of this single test fire. The fact that a smoke detector located in an adjacent hallway only a few feet from the fire's starting point alarmed earlier provides little, if any, evidence that a smoke detector in any other part of the house would also have alarmed earlier. Second, the partial dissent states that the results of the Cal Chiefs' and Indiana Dunes fire tests "confirm" that smoke detectors outperform heat detectors "regardless of location." Those tests, however, compared the performance of heat detectors and smoke detectors located in the same room. There is considerable evidence in the record that smoke detectors alarm more quickly than heat detectors when both are located in the same room. Since it is not practical, however, to put smoke detectors in kitchens and garages, tests of comparative heat and smoke detector performance in the same room provide little or no meaningful evidence on this issue. Finally, the partial dissent notes the testimony of two fire science experts who concluded that the additional protection provided by the combined system was "marginal" (Tr. 1058) or "slightly better" (Tr. 711). As discussed above, it is not clear that a "marginal" or "slightly better" level of protection would not be considered significant by some consumers. These experts did not say that the additional protection provided by heat detectors would be considered insignificant by consumers, and they would not have been qualified to do so. [36]

Therefore, representations that heat detectors provide significant additional protection when installed in areas where smoke detectors would not function properly are not necessarily deceptive. Such claims, however, must be substantiated, must not exaggerate the extent of that additional protection and must disclose any qualifying information needed to correct misimpressions the claims would otherwise cause.

b. *Heat Detectors May Provide Additional Protection That Some Consumers Would Consider Significant Because They Are More Reliable Than Smoke Detectors*

In the words of one of complaint counsel's experts, heat detectors are "highly reliable." (Tr. 724)

They are pretty simple in terms of their construction. They are not electrically operated. They are mechanical in nature. There are fewer things to go wrong with them.

So when the conditions reach the level that they would normally activate, you are pretty sure they are going to activate. (Tr. 723)

Smoke detectors, on the other hand, do require occasional cleaning and will not function if the household's electrical power supply is interrupted or if batteries are not replaced periodically. Battery-powered smoke detectors sound an alarm [37] when the battery needs to be replaced, but some people may ignore that warning or fail to replace the old battery after removing it. Estimates of the percentage of battery-operated smoke detectors that are not functioning at any given time range from eight percent (Tr. 1048) to from 50 to 80 percent. (RX 5) One of complaint counsel's experts estimated the failure rate at "30 to 40 percent." (Tr. 904–06)[25]

Obviously, an operating heat detector provides greater protection than a nonoperating smoke detector. The Cal Chiefs' and Indiana Dunes Tests show that heat detectors do not provide the necessary warning to allow safe escape in most residential fires, but heat detectors did provide warning before one or more tenability limits was exceeded in some test fires. The amount of additional protection provided by heat detectors is relatively large if the higher estimates of the failure rate of smoke detectors are accepted and relatively small if the lower estimates are used. But as we previously concluded, even a relatively small amount of additional protection from death or serious injury could be considered significant by some consumers. Complaint counsel have failed to prove that the [38] additional protection provided by the greater mechanical reliability of heat detectors is not significant.

Therefore, claims that heat detectors provide some additional protection because they are maintenance-free and mechanically rather than electrically operated are not necessarily deceptive. Again, unsubstantiated or exaggerated claims about the extent of that additional protection would be deceptive, and the disclosure of certain qualifying information may be required in advertising or promotional materials that make claims about the performance of heat detectors.

[25] The dissent states that all those failure rates should be discounted because smoke detectors that had a dead battery (or missing battery) or that did not meet the Underwriters' Laboratory smoke sensitivity standard were included in the "failed" category. We see no reason to lower the failure rate by arbitrarily excluding insufficiently sensitive detectors or detectors with dead batteries from the "failed" group. Dead batteries and gradual sensitivity loss due to dust accumulation are exactly the sort of problems to which heat detectors are not subject. Heat detectors are more reliable than smoke detectors not only because they have fewer or simpler parts but also because they don't require regular maintenance.

c. *Heat Detectors Do Not Respond More Quickly To Hot, Flaming Fires*

The Cal Chiefs' and Indiana Dunes Tests measured the response of heat and smoke detectors to hot, flaming fires and smoky, smoldering fires. Although Figgie claims that heat detectors are needed because they provide early warning of hot, flaming fires, the Cal Chiefs' and Indiana Dunes test results show that smoke detectors give earlier warning of both smoldering fires and flaming fires. As the National Fire Protection Association concluded, "the results of full-scale experiments conducted over the past several years . . . indicate that detectable quantities of smoke precede detectable levels of heat in nearly all cases." (CX 23K) **[39]**

Therefore, we find that Figgie's claims that its heat detectors provide significant additional protection because they respond more quickly than smoke detectors to hot, flaming fires are false.

V. FIGGIE HAD ADEQUATE NOTICE OF THE MATTERS OF FACT ASSERTED IN THIS PROCEEDING

Figgie argues that the Commission violated Section 554(b) of the Administrative Procedure Act[26] by failing to provide notice of "the matters of fact . . . asserted" in this case. Specifically, Figgie claims that the term "life endangering conditions," which appears in Paragraph 6(1) of the amended complaint, was never clearly defined. Consequently, Figgie argues that it was unable to understand and respond to the complaint's allegation that Figgie's claims that its heat detectors provide the necessary warning to allow safe escape in most fires are deceptive because "life endangering conditions will occur prior to the activation of [Figgie's] heat detectors" in nearly all residential fires. (RAB 13–20)

It is clear now that complaint counsel intended the term "life endangering conditions" to refer to the presence of smoke, heat or carbon monoxide at levels sufficient to impede or bar safe escape from a residential fire. It is hard to imagine that a manufacturer of fire detection devices would not have immediately assumed that smoke, heat and carbon monoxide, which are obvious fire-related dangers, were among the "life endangering conditions" mentioned in the complaint. After **[40]** prehearing conferences and pretrial discovery, including depositions of complaint counsel's expert witnesses and an examination of complaint counsel's documentary exhibits, it should have been completely clear that the term "life endangering conditions" included excessive levels of smoke, heat or carbon

[26] 5 U.S.C. 554(b) (1983).

monoxide.[27] Because it was "apprised of the issues actually at stake and in fact litigated them throughout the proceeding,"[28] we conclude that Figgie had adequate notice of the matters of fact asserted.

VI. THE ALJ'S DECISION WAS NOT BASED ON "ALTERNATIVE THEORIES" NOT ALLEGED IN THE COMPLAINT

According to Figgie, the complaint essentially alleges that heat detectors are "virtually worthless" or "virtually useless." (RAP 21) The ALJ found that heat detectors are not worthless or useless but still concluded that Figgie had violated [41] Section 5. Therefore, Figgie argues, the ALJ wrongly imposed liability based on "alternative theories" not pled in the complaint.

The theory of the complaint is that Figgie made certain deceptive representations. The case was tried and defended by Figgie on that theory. The ALJ concluded that Figgie had made the alleged representations, that those representations were deceptive and that an order correcting those misrepresentations was appropriate. Complaint counsel admit that they believe heat detectors to be virtually worthless (CAB 23), but the complaint does not contain that allegation.

The ALJ did not conclude that heat detectors are virtually worthless, but he did conclude that the allegations in the complaint were proved by complaint counsel. Those conclusions are not inconsistent, and we affirm them.

VII. THE ORDER

We conclude that an order prohibiting Figgie from engaging in the same or similar deceptive acts and practices in the future is in the public interest. Unless we issue an appropriate order, future purchasers of Vanguard heat detectors may continue to be misled. It is also important that past purchasers of Vanguard heat detectors be provided with accurate information about the performance of Vanguard heat detectors. We reject the respondent's contention that "[i]f there is a problem here, there is no reason it should not be left to the free market to resolve it." (RAP A–26) [42]

After considering the record in this case and the arguments of counsel for both parties, we have decided to issue an order that differs

[27] For example, complaint counsel stated at the first prehearing conference on July 18, 1983, that they intended to show that heat detectors would not give warning of "life endangering conditions" created by "smoke [and] carbon monoxide." (Tr. 5) Complaint counsel's document list, which was filed on November 8, 1983, includes several documents reporting the results of the Cal Chiefs' and Indiana Dunes tests. In both of those tests, residential fire detectors were evaluated on the basis of whether they alarmed before certain levels of smoke, heat or carbon monoxide developed. Finally, Figgie cross-examined complaint counsel's expert witnesses extensively on the appropriateness of the smoke, heat and carbon monoxide levels that were used as tenability limits in those and other residential fire detector tests. (Tr. 714–18, 894–98, 907–24, 1069–70, 1086–89, 1092–1124)

[28] *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 216 (2d Cir. 1976).

in some respects from the ALJ's order. Our discussion of each section of the final order will include an explanation of why those changes have been made.

A. *Part I of the Order*

Part I.A.(1) of the ALJ's order prohibits representations that heat detectors will provide the necessary warning to allow safe escape unless an affirmative disclosure that hazardous conditions usually develop before heat detectors activate is included. As complaint counsel argue, an order provision requiring an affirmative disclosure to help correct a misrepresentation does not obviate the need for an order provision prohibiting the misrepresentation directly. (CAP 4–7) We have modified Part I.A.(1) accordingly.

Part I.A.(2) of the ALJ's order prohibits representations that a combination system of heat and smoke detectors provides significantly increased protection unless an affirmative disclosure concerning standards for smoke detector location is included. Because we found that claims that a combined system provides increased protection because heat detectors respond more quickly to hot, flaming fires is deceptive, we have substituted a new provision to prohibit such misrepresentations. Of course, this provision is not intended to prevent truthful, substantiated representations that heat detectors may provide some additional protection because they can be installed in certain areas where [43] smoke detectors cannot and because heat detectors are maintenance-free and do not depend on electricity or batteries.

Parts I.B. and I.C. of the ALJ's order have not been changed.

B. *Part II of the Order*

Part II of the ALJ's order required that Figgie place the following affirmative disclosure on all promotional materials: "CAUTION: In most residential fires dangerous levels of smoke, heat and carbon monoxide gas will build up before the heat detector alarm goes off." Complaint counsel proposed making that disclosure even stronger: "CAUTION: Heat detectors will *not* help you get out of the house in time in most fires. Heat detectors will *not* protect you from most fires because dangerous levels of smoke, heat and carbon monoxide gas can build up before the heat detector goes off." (CAP 7–9)

We have concluded that the following affirmative disclosure would be more appropriate: "NOTICE: Smoke detectors give earlier warning than heat detectors in nearly all residential fires. That is because detectable amounts of smoke almost always develop before detectable levels of heat." This disclosure, which is a paraphrase of a statement found in Appendix A to NFPA Standard 74, is preferable to the disclo-

sures proposed by the ALJ and complaint counsel for two reasons. First, it is more accurate because it is not clear from the evidence that dangerous levels of smoke, heat and carbon monoxide gas developed in the Cal Chiefs' and Indiana Dunes test fires before heat detectors [44] alarmed. Second, we believe that it is particularly important to inform consumers of the relative performance of heat and smoke detectors. The fact that smoke detectors almost always provide earlier warning than heat detectors would seem to be the single most useful piece of information that could be provided to potential purchasers of residential fire protection systems.

This disclosure must appear on all promotional materials that expressly or impliedly represent that heat detectors provide the necessary warning to allow safe escape in the event of fire or that a combination heat and smoke detector system provides significantly greater protection than smoke detectors alone.

C. *Part III of the Order*

Part III of the ALJ's order has not been changed.

D. *Part IV of the Order*

Complaint counsel appealed the ALJ's decision not to include an order provision requiring Figgie's dealers to obtain signed acknowledgements from purchasers of its heat detectors indicating that they had seen the affirmative disclosure required by Part II of the ALJ's order. According to complaint counsel, the dealers have an incentive to alter the brochures and other promotional materials prepared by Figgie but distributed to consumers by the dealers in order to delete or obscure the required affirmative disclosure. [45]

The ALJ's order does not apply to dealers, and there is a danger that some dealers may alter the required disclosure or otherwise deceive consumers. We therefore agree with complaint counsel that a "fencing in" provision aimed at preventing dealer misconduct is appropriate.

Complaint counsel's proposal to require dealers to obtain signed acknowledgements indicating that consumers have seen the required disclosure would burden honest dealers unnecessarily, yet would do nothing to remedy other deceptive practices by dealers. Part IV of the order, therefore, requires Figgie to obtain written assurances that its dealers will conform their practices to this order, to cease selling fire warning devices to any dealer who does not provide such assurance, and to investigate and make good faith efforts to resolve any consumer complaints about deceptive practices by its dealers.

E. *Part V of the Order*

Part V of the ALJ's order has been amended to require Figgie to maintain and make available for our inspection copies of each complaint it receives about a dealer's sales practices and records of its investigation and disposition of each of those complaints. [46]

F. *Parts VI and VII of the Order*

Parts VI and VII of the ALJ's order have not been changed.

VIII. CONCLUSION

The ALJ's initial decision is affirmed in part and modified in part, and the attached order is entered.

STATEMENT OF COMMISSIONER PATRICIA P. BAILEY CONCURRING IN PART AND DISSENTING IN PART

The Commission rules today that respondent Figgie International, Inc. (Figgie) misrepresented the performance of its Vanguard heat detectors. I agree. Figgie claimed that its heat detectors "provide the necessary warning to occupants to allow them to escape safely" from residential fires. That is untrue for nearly all residential fires, and the Commission's order prohibits Figgie from repeating that claim.

The complaint in this matter also alleged that respondent claimed that its "fire alarm systems combining heat detectors and smoke detectors provide *significantly greater* fire warning protection for occupants than smoke detectors alone." Complaint para. 5 (emphasis added). The Commission agrees that this claim was made in three forms, but concludes that complaint counsel failed to prove that two of them were false.[1] I believe [2] complaint counsel adequately proved that heat detectors do not provide "significantly greater" protection in any of the three fashions claimed, and so I dissent from that part of the Commission's opinion.

Figgie made the following statements, all of which contribute to the notion that heat detectors provide significantly greater protection from fires than smoke detectors alone: "HEAT DETECTORS HAVE PROBABLY SAVED MORE LIVES AND PROPERTY THAN ANY OTHER FIRE DETECTION DEVICE" (CX 63); combining heat detectors with smoke detectors gives consumers "the combination needed to give a greater measure of life safety" and is needed "to maximize

[1] The opinion examines three different ways in which Figgie represented that its heat detectors were significantly better than smoke detectors alone: in their response to hot, flaming fires; in their ability to be located where smoke detectors are not recommended; and in their mechanical reliability. The Commission rules the first claim deceptive, and I agree. My dissent focuses on the resolution of the second two claims. I join the Commission's opinion and order in all other respects.

chances for survival" (CXs 69, 68); and "to have adequate protection, the home must have heat detectors as well as smoke detectors." (CX 130) In the face of this and other evidence, the ALJ found that a claim of "significantly greater benefit" was made, and the Commission expressly adopts that conclusion. Opinion at 11 & n. 12.

The record evidence of how heat detectors actually perform compared to smoke detectors contrasts sharply with the picture Figgie painted in its advertising and marketing materials. For example, Figgie claimed that its heat detectors are significantly more protective because they can be placed where smoke detectors are not recommended (such as kitchens, garages, and attics). However, the expert testimony and test data introduced at trial establish that this confers virtually no life safety protection benefit over smoke detectors because smoke detectors almost always alarm before heat detectors, regardless of their [3] respective locations.[2] Figgie also claimed that heat detectors provide significantly more protection because they are mechanically reliable. Smoke detectors, which rely on outside power sources, are theoretically less reliable than mechanically operated heat detectors. But the most reliable empirical data in [4] the record suggests that the difference is quite small so that characterizing it as "significantly greater" life safety protection is inaccurate.[3]

Moreover, this record demonstrates that: (1) smoke detectors provide the best protection for saving lives in case of fire; and (2) heat detectors, wherever placed, do not alarm soon enough to allow safe

[2] The record includes a test report in which a heat detector was placed in a kitchen and a smoke detector was placed in an adjacent hallway; after a fire was set in the kitchen, the smoke detector located elsewhere in the house alarmed before the heat detector located in the same kitchen. (I.D. 149) While this represents the result of only a single test, the conclusion about the respective performance of the devices holds true in almost all cases, according to experts who testified. They asserted that smoke detectors would almost always alarm before heat detectors because smoke disperses quickly and evenly throughout a home, while heat buildup is highly uneven. Detectors that react to smoke are not limited in space coverage the way that detectors that react to heat are. As a consequence, these experts testified that heat detectors would *not* significantly increase consumers' life safety potential and would provide only marginal benefits by increasing property protection. (Bukowski Tr. 1058–59; Clark Tr. 711–12).

Other test data in the record confirm that smoke detectors virtually always outperform heat detectors, regardless of location. For example, the Indiana Dunes I and II tests, showed that heat detectors provided no increase in escape time compared to smoke detectors. (Bukowski Tr. 988–91) In Dunes I, heat detectors never activated first and in one-third of the tests no heat detectors ever activated at all. (Bukowski Tr. 986) In Dunes II, not one heat detector alarmed in time to provide three minutes of escape time. (Bukowski Tr. 991) The California Fire Chiefs' tests, which included tests where fires were set in the kitchen, similarly reported that heat detectors never responded first to fires. (Martin Tr. 879) The Commission's opinion discounts the results of these tests because it claims the tests measured only comparative heat and smoke detector performance in the same room. However, each test involved detector arrays in several locations in each house, so that the responses of heat and smoke detectors in different rooms were recorded and compared. The results show that smoke detectors alarmed in time to give the necessary three-minute warning in 89 percent of the tests in Dunes I, and that heat detectors added *no* increase in protection. (Bukowski Tr. 980, 982–83).

[3] The only objective data on comparative smoke detector reliability are from three tests, one showing a failure rate of approximately two percent per year, another showing a failure rate of eight percent over several years, and a third showing that 16 percent of smoke detectors surveyed in the field over an indeterminate period were not operational. (Bukowski Tr. 1048) Because the definition of failure used to compile these figures encompasses a range of performance well short of mechanical failure—such as slight decreases in smoke detector sensitivity and removal of batteries (Bukowski Tr. 1051)—the rates of actual smoke detector failure are even lower than these figures suggest.

escape in most residential fires. Since heat detectors do not allow consumers to escape safely from most fires, but smoke detectors do, it is difficult to understand how heat detectors could be said to provide "significantly greater" protection than smoke detectors, or even any "significant" degree of protection at all.

The Commission's failure to enter a finding that Figgie's "significantly greater" benefit claims are deceptive stems primarily from what I believe to be a misreading of the complaint and complaint counsel's burden. The Commission agrees that the relevant claims were made and reaches conclusions not too dissimilar from my own about what level of increased protection heat detectors provide in the two situations in dispute. However [5] the Commission then asks not whether that level of increase is "significant," but whether even a small or slight increase might nevertheless be "important" or "meaningful" or "significant" to at least some consumers. This is the crux of the Commission's error: a shift in emphasis away from the complaint's focus on whether the *increase* is significant and towards a new focus, not pled in the complaint and thus not litigated at trial, on whether the *protection* is or may be significant to some consumers.[4]

While this may appear to be only a subtle shift in emphasis, it reverses the result in the case. I would prohibit Figgie from repeating any claims to the effect that heat detectors provide "significantly greater" protection than smoke detectors, although I would permit the company to publicize whatever marginal increases in protection are demonstrated by the evidence because I agree with the opinion's conclusion that some consumers might consider even slight increases in fire protection "important" (particularly if they are highly risk averse). The Commission appears to agree that at least some of Figgie's increased benefit claims are false (concluding, for example, that placement of heat detectors confers only a "slightly," not a significantly, better level of protection), but refuses to ban those false claims [6] outright because complaint counsel failed to prove that no one would find slight increases in fire protection significant.[5]

I think the opinion is trying to say that if consumers have no other protection, then heat detectors in their garages may help to prevent property damage, and that should consumers with smoke detectors fail to maintain them then a heat detector may provide an alarm that

[4] This focus is especially curious since the actual claims Figgie made did not by any stretch of the imagination suggest that heat detectors added only slight increments of protection that could be important to some people. To the contrary, Figgie repeatedly stressed that consumers' chances for survival were significantly greater, or "maximize[d]," with heat detectors and that smoke detectors alone were inadequate to save them and their families from death by fire.

[5] The suggestion that complaint counsel should have provided testimony or survey evidence to show what level of additional protection consumers find "significant" is in my view unwarranted. *See* Opinion at 33. Once the Commission determines what claims Figgie made, this case simply does not present questions of consumer perception. Surely the Commission does not mean to suggest that complaint counsel must prove first that a claim is false as a matter of scientific fact and second that it is false in the subjective view of consumers.

is late, but better than nothing. In other words, the Commission believes Figgie should be allowed to continue selling heat detectors to consumers who are sufficiently risk averse that they are willing to spend between $500 and $600 for a heat detector system that adds at most a slight increment of protection to smoke detectors. I do not disagree with that goal. I simply disagree with the notion that Figgie can continue to sell its heat detectors by convincing consumers that they are more valuable, and more beneficial in protecting the lives of consumers and their families, than the evidence shows to be true.

My dissent is tempered only by the fact that the order entered in this case prohibits Figgie from making performance claims for its heat detectors which cannot be substantiated. I believe the record of this proceeding contains clear evidence that Figgie cannot substantiate claims that its heat detectors [7] provide "significantly greater" life safety protection than do smoke detectors alone. For that reason, therefore, the order should have the effect of restraining Figgie indirectly from making exaggerated claims of this kind in the future. But there is not the slightest reason, on this record, to have left open any doubt on this point. Figgie's heat detectors do not provide "significantly greater" fire warning protection for occupants than smoke detectors alone, and Figgie should have been told directly in the order not to make that claim again or any of the statements that contributed to it.

Final Order

This matter has been heard by the Commission upon the appeals of respondent and complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying opinion, the Commission has denied the appeal of the respondent and has granted in part and denied in part the appeal of complaint counsel.

It is ordered, That the initial decision of the administrative law judge be adopted as the findings of fact and conclusions of law of the Commission except where it is inconsistent with the accompanying opinion. Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be entered:

I.

It is ordered, That respondent, Figgie International, Inc., its successors and assigns, and respondent's officers, agents, representatives

and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale or distribution of any heat detector or any residential fire alarm system containing a heat detector, as the term "heat detector" is defined by the National Fire Protection Association's Standard 74, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from: [2]

A. Representing in any manner, directly or by implication:

(1) That heat detectors provide the necessary warning to allow safe escape from most residential fires; or

(2) That fire alarm systems combining heat detectors and smoke detectors provide significantly greater fire warning protection than smoke detectors alone because heat detectors give earlier warning of hot, flaming fires.

B. Misrepresenting in any manner, directly or by implication:

(1) The performance characteristics of any heat detector or any residential fire alarm system containing a heat detector including, but not limited to, the capability of the heat detector to provide the necessary warning to occupants to allow them to escape safely in the event of fire; or

(2) The existence or content of any standard or recommendation established or made by the National Fire Protection Association or any other entity regarding the location, number or type of fire protection devices to be installed in a residence, or compliance of any heat detector or residential fire alarm system containing a heat detector with any such standard or recommendation; or

(3) The performance characteristics of any smoke detectors or any residential fire alarm system containing a smoke detector; or

C. Representing in any manner, directly or by implication, the performance characteristics of any heat detector or any fire alarm system containing a heat detector including, but not limited to, the capability of the heat detector to provide fire warning protection, unless at the time of making any such representation respondent possesses and relies upon competent and reliable scientific evidence which substantiates such representation.

II.

It is further ordered, That respondent shall, within 120 days from the date of service of this order, include the following notice in all print advertising or print promotional material for all heat detectors manufactured or sold by respondent or for any fire warning system

containing such heat detectors, if that advertising or promotional material expressly or impliedly represents that heat detectors provide the necessary warning to [3] allow safe escape in the event of fire or that a combination system of heat and smoke detectors provides significantly greater protection than smoke detectors alone:

NOTICE: Smoke detectors give earlier warning than heat detectors in nearly all residential fires. That is because detectable amounts of smoke almost always develop before detectable levels of heat.

The above-required language shall be printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page. Nothing contrary to, inconsistent with, or in mitigation of the above-required language shall be used in any advertising or promotional materials. With respect to any film, video tape, or slide promotional material, the above-required language shall be included both orally and visually within the first minute of the presentation, in a matter designed to ensure clarity and prominence.

III.

It is further ordered, That respondent shall, within 180 days after service of this order, send by first-class mail, to each identifiable purchaser of respondent's fire alarm products since January 1, 1979, the disclosure required by Part II.

Purchasers shall be deemed identifiable if they can be traced using warranty cards or testimonial letters in respondent's possession and/or using sales records maintained by respondent's dealers.

IV.

It is further ordered, That respondent shall:

A. Distribute a copy of this order to all of its officers and to all employees, agents or representatives having sales or promotional responsibilities with respect to the subject matter of this order. The respondent shall also distribute a copy of this order to each dealer of its fire alarm products.

B. Provide each of its dealers with a form clearly stating that dealer's intention to conform his or her sales practices to the requirements of this order.

C. Cease selling its fire warning devices to any dealer who does not

sign and return that form to respondent or fails to conform his or her sales practices to the requirements of this order. [4]

D. Investigate and make good faith efforts to resolve any complaints it receives that any dealer has failed to conform his or her sales practices to the requirements of this order.

V.

It is further ordered, That respondent shall maintain such documents as will demonstrate compliance with this order for a period of three years from the date the document is created or used, whichever is later. Such documents shall be made available to the Commission or its staff for inspection and copying upon reasonable request and shall include, but not be limited to, the following:

(a) A copy of each nonidentical form of promotional and training materials disseminated by respondent;

(b) The name and last known address of each dealer of respondent's fire alarm products;

(c) The name and last known address of each purchaser identified under Part III of this order; and

(d) A copy of each complaint it receives that any of its dealers has failed to conform his or her sales practices to the requirements of this order, and a record of the investigation and disposition of the complaint.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order. [5]

VII.

It is further ordered, That respondent shall, within 120 days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Bailey concurred in part and dissented in part and Commissioner Strenio did not participate.

IN THE MATTER OF

FLOWERS INDUSTRIES, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9148. Consent Order, Nov. 3, 1983—Modifying Order, April 16, 1986

The Federal Trade Commission has modified a 1983 consent order with Flowers Industries, Inc. [102 F.T.C. 1700], a Thomasville, Ga. baker, by appointing a trustee to divest two bakeries and extending for six months the deadline for the divestitures.

ORDER MODIFYING ORDER TO DIVEST

On November 3, 1983, the Commission issued its order in this matter requiring, *inter alia,* that respondent Flowers Industries, Inc. ("Flowers") "divest itself absolutely and in good faith of the High Point Bakery Plant . . . [and] of the Gadsden Bakery Plant to an Eligible Person including, without limitation, land, buildings, fixtures attached thereto, machinery and equipment." As of the date of this order, neither plant has been divested by Flowers. Because it appeared that the public interest would be served by modifying the order to allow for the appointment of a trustee to accomplish divestiture, on March 19, 1986, the Commission issued its Order To Show Cause Why Order Requiring Divestiture Should Not Be Modified ("order to show cause") pursuant to Section 3.72 of the Commission's Rules of Practice. The order to show cause proposed the insertion of a new Paragraph VII of the order to appoint Graham Humes of Mellon Bank (East) N.A. as trustee. On March 31, 1986, the order to show cause was served on Flowers, and Flowers answered on April 2, 1986, stating that it consents to the modifications.

After reviewing Flowers's answer and the materials submitted with its compliance reports, the Commission has concluded that the public interest warrants modifying the order as proposed in the order to show cause. As the Commission observed in the order to show cause, the appointment of the trustee appears likely to advance the remedial objectives of the order.

Accordingly,

It is hereby ordered, That pursuant to 15 U.S.C. 45(b), and Section 3.72 of the Commission's Rules of Practice, 16 C.F.R. 3.72, (1) Paragraphs VII, VIII, IX, X and XI of the order in this matter be modified to renumber these Paragraphs VIII, IX, X, XI, and XII respectively, and (2) a new Paragraph VII be added to the order, as follows:

VII

The Commission hereby appoints Graham Humes, of Mellon Bank (East) N.A., as Trustee to serve subject to all the terms and conditions specified herein.

A. *Powers and Duties of Trustee; Conditions of Trusteeship*

1. The Trustee shall have the duty and authority to effect the divestiture of the properties and assets of Flowers subject to divestiture pursuant to Paragraphs I and II of this order ("the Assets") as quickly as possible in good faith to an Eligible Person who has represented in good faith that the Assets will, if acquired, be used in accordance with subparagraphs I(B) and II(B) of the order. The Trustee may divest the plants separately or together.

2. The duty and authority of the Trustee to divest the Assets shall be at the most favorable price and terms available, but there shall be no minimum price therefor.

3. If requested by Flowers or the Commission, the Trustee shall furnish a surety bond, the cost of which may be included in the Trustee's expenses as provided in subparagraph VII(D).

4. Except for cases of misfeasance, negligence, willful or wanton acts, or bad faith by the Trustee, the Trustee shall not be liable to Flowers for any action taken or not taken in the performance of the trusteeship. Flowers shall indemnify the Trustee and hold the Trustee harmless against any liabilities, claims, or expenses arising out of performance of the trusteeship, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, claims, or expenses result from misfeasance, negligence, willful or wanton acts, or bad faith by the Trustee.

5. Rule 2.41(f) of the Commission's Rules of Practice and Procedure shall apply to the Trustee in the same manner as it would be applicable to Flowers.

6. The Trustee may seek approval of a proposed acquirer at any time during the period specified in subparagraphs VII(B)(1) and VII(B)(2), and the Trustee may seek approval for more than one proposed acquirer. After the expiration of the time for seeking approval of a proposed acquirer, the Trustee shall have no duty or authority to seek approval of a proposed acquirer.

7. Each request to the Commission for approval of a proposed acquirer shall be in writing and shall include a definitive written agreement between the proposed acquirer and the Trustee. The agreement

shall be conditional upon approval of the transaction by the Commission.

8. The Trustee shall have the power (a) to retain the services of attorneys, appraisers, consultants, investment bankers, and such others as may be reasonably necessary to assist in the divestiture of the Assets; (b) to disclose confidential information and data respecting the Assets to any person who, in the opinion of the Trustee, shows a bona fide interest in acquiring the Assets or any portion thereof; (c) to enter into such contracts and execute such documents on behalf of Flowers as may be reasonable and necessary to effect divestiture in accordance with the terms of this order, *provided,* that such contracts and documents may include representations, warranties, covenants, and indemnity agreements only as to clear title; and (d) to take such other actions as may be reasonable and necessary to effect divestiture in accordance with the terms of this order.

9. Within thirty days following appointment of the Trustee and every thirty days thereafter, until the Commission approves a proposed acquirer or the time for seeking approval of a proposed acquirer has expired, the Trustee shall submit a verified report in writing to the Commission, with a copy to Flowers, setting forth (a) the steps taken by the Trustee to make public the availability for purchase of the Assets, (b) a list of all persons or organizations to whom notice of availability for purchase has been given directly, (c) a summary of all discussions and negotiations together with the identities and addresses of all interested persons or organizations, and (d) copies of all internal memoranda, offers, counter-offers, communications, and correspondence concerning divestiture. The Trustee shall provide such other reports as may be required by the Commission.

10. The Trustee shall account for all monies derived from any divestiture. All funds received by the Trustee from a prospective acquirer shall be deposited immediately in a federally chartered bank in an interest-bearing account until settlement of the Trustee's account.

11. Within sixty days after divestiture or after expiration of the time for seeking approval of a proposed acquirer, the Trustee shall submit to the Commission a detailed final accounting, including all amounts received or paid by the Trustee and all unpaid amounts still owing to the Trustee or others. Upon approval of the accounting by the Commission, the Trustee shall pay the approved unpaid expenses and pay the balance of the funds, together with all interest earned, to Flowers. Should the amount in the Trustee's account be insufficient to pay the approved unpaid expenses and to compensate the Trustee, Flowers, within 15 days after receiving notice thereof from the Commission, shall deliver to the Trustee an amount sufficient to compen-

sate the Trustee pursuant to subparagraph VII(D) and to permit the Trustee to pay all approved unpaid expenses.

12. The Trustee may be removed by the Commission for failure to discharge the Trustee's obligations diligently or faithfully, or for other good cause. Upon the removal, death, or resignation of the Trustee, a successor Trustee shall be appointed by the Commission. Selection of such successor Trustee shall be subject to the consent of Flowers, which consent shall not be unreasonably withheld.

B. *Term of Trusteeship; Extension*

1. The Trustee shall have 180 days from the date of appointment to submit requests for approval of a proposed acquirer to the Commission.

2. That time period may be extended by the Commission (a) upon the removal, death, or resignation of the Trustee, for an additional thirty days plus a period equal to the time during which there was no Trustee; (b) for a period necessary to remedy any delay in the submission of a request for approval of a proposed acquirer that has been substantially caused by any violation of this order by Flowers; or (c) for a period equal to such time as there exists any unresolved dispute with Flowers over the interpretation of this order.

3. The trusteeship shall terminate upon the Trustee's discharge of the obligations set forth in subparagraph VII(A)(11).

C. *Additional Obligations of Flowers*

1. Flowers shall cooperate fully with the Trustee in the Trustee's efforts to effect divestiture of the Assets. Flowers will do nothing to impede or interfere with those efforts.

2. When requested to do so by the Trustee, Flowers shall promptly empower the Trustee to perform, on Flowers' behalf, every act necessary to convey clear title to the Assets from Flowers to any Eligible Person in accordance with the terms of this order. All documents to be executed in compliance with this subparagraph shall first be submitted to and approved by the Director of the Bureau of Competition.

3. When requested to do so by the Trustee, Flowers shall promptly provide the Trustee and prospective acquirers with existing information relating to the Assets, including but not limited to, written information and data, access to the Assets, access to records relating to the Assets, access to personnel for tours and inspections of the Assets, access to knowledgeable personnel for answering questions about the Assets, and information previously submitted to the Commission regarding Flowers's prior divestiture efforts.

4. Flowers shall not cause or permit the Assets to become subject

to any new lien or encumbrance, and no existing lien or encumbrance shall be increased.

D. *Compensation and Expenses of Trustee*

1. The Trustee's compensation shall be paid by Flowers, and the Trustee's reasonable expenses shall be reimbursed by Flowers.

2. The Trustee's compensation shall consist of a flat fee and a contingent fee, as follows:

(a) The Trustee shall be paid a flat fee of $5000 per month from the date hereof until the first to occur of either:

(i) divestiture of the Assets as provided for herein, or

(ii) the expiration of the time provided for seeking approval of a proposed acquirer.

(b) In addition to the flat fee specified in subparagraph VII(D)(2)(a), the Trustee shall be paid a fee contingent upon the consummation of the divestitures contemplated hereunder from the proceeds of the divestitures.

(c) If the combined purchase price of the Assets is less than or equal to six million dollars, the contingent fee shall be $10,000 for the divestiture of the properties and assets subject to divestiture pursuant to Paragraph I of this order and $10,000 for the divestiture of the properties and assets subject to divestiture pursuant to Paragraph II of this order, plus an additional amount based on the combined purchase price of the Assets and calculated as follows:

(i) 3% of that portion of the purchase price less than or equal to one million dollars; plus

(ii) 1% of that portion of the purchase price greater than one million dollars but less than or equal to two million dollars; plus

(iii) 2% of that portion of the purchase price greater than two million dollars but less than or equal to three million dollars; plus

(iv) 3% of that portion of the purchase price greater than three million dollars but less than or equal to four million dollars; plus

(v) 4% of that portion of the purchase price greater than four million dollars but less than or equal to five million dollars; plus

(vi) 5% of that portion of the purchase price greater than five million dollars but less than or equal to six million dollars.

(d) If the combined purchase price of the Assets is greater than six million dollars, the contingent fee shall be based on the combined purchase price of the Assets and calculated as follows:

(i) if the purchase price is greater than six million dollars but less

than or equal to seven million dollars, 6% of the purchase price;

(ii) if the purchase price is greater than seven million dollars but less than or equal to eight million dollars, 7% of the purchase price;

(iii) if the purchase price is greater than eight million dollars but less than or equal to nine million dollars, 8% of the purchase price;

(iv) if the purchase price is greater than nine million dollars but less than or equal to ten million dollars, 9% of the purchase price;

(v) if the purchase price is greater than ten million dollars, 10% of the purchase price.

3. Notwithstanding any other term of this order, Flowers shall not be obligated to reimburse the Trustee for any expenses in excess of $30,000 unless those expenses have been approved by the Commission.

4. Each month the Trustee shall present Flowers with a detailed written statement of the Trustee's expenses for the previous month. A copy of each monthly expense statement shall be sent to the Director of the Bureau of Competition. Subject to the condition set forth in subparagraph VII(D)(3), Flowers shall reimburse the Trustee for such expenses within five days of receipt of each monthly statement.

E. *Resolution of Disputes*

1. If Flowers and the Trustee are unable to resolve any dispute arising out of the interpretation of this order, either party may notify the Commission thereof in writing.

2. The Commission shall resolve a dispute arising under subparagraph VII(E)(1) without unreasonable delay. With regard to any dispute arising out of the interpretation of subparagraphs VII(A)(8)(a), VII(A)(8)(b), VII(C)(3), or VII(D) of this order, the Commission's determination shall be final and binding upon Flowers and the Trustee.

3. For the purpose of subparagraph VII(B)(2)(c), an unresolved dispute shall exist as of the day the Commission (a) receives notice under subparagraph VII(E)(1), or (b) in the case of a dispute between it and Flowers, notifies Flowers in writing thereof.

F. *Termination of Obligation To Divest*

Except upon a showing that any act or omission by Flowers in violation of the terms of this order has contributed substantially to the Trustee's inability to divest the Assets, Flowers's obligation to divest the Assets under this order shall terminate upon the expiration of the time for seeking approval of a proposed acquirer; *provided, however,* that Flowers shall proceed to accomplish any divestiture that has been approved by the Commission, or that is subsequently approved by the Commission if the request for approval was received

by the Commission before the expiration of the time for seeking approval of a proposed acquirer.

Commissioner Strenio was recorded as not participating.

IN THE MATTER OF

SAAB-SCANIA OF AMERICA, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3183. Complaint, April 16, 1986—Decision, April 16, 1986

This consent order requires an Orange, Conn. wholly-owned subsidiary of a Swedish automobile company, among other things, to make repairs or reimburse consumers for costs they incurred because of paint problems with Saab cars assembled at the company's factory in Malines, Belgium, from 1976 to 1978. The offer to repair or reimburse will be made to consumers who bought a new Belgian-made Saab after Dec. 31, 1977 and to subsequent owners who bought their vehicle within the first 36 months after the original purchase. The repair or reimbursement cost will be up to $2,000 per car, except for cars purchased in Massachusetts. The Attorneys General in Massachusetts, Maine and Vermont have reached separate agreements with Saab in those states over the paint problem, but Saab consumers in Maine and Vermont are eligible for the repair or reimbursement program.

Appearances

For the Commission: *Eloise Gore.*

For the respondent: *Jeremy G. Zimmermann* and *Linda L. Randell, Wiggin & Dana,* New Haven, Conn.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Saab-Scania of America, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Saab-Scania of America, Inc., is a Connecticut corporation, with its principal office and place of business at Saab Drive, Orange, Connecticut.

PAR. 2. Respondent is now, and has been, engaged in the advertising, offering for sale, sale, and distribution of Saab automobiles to authorized dealers for sale to members of the public.

PAR. 3. In the course and conduct of its aforesaid business, respondent causes and has caused automobiles to be shipped to dealers in

various states, and therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the automobiles that respondent offered for sale, sold, and distributed were 1976 through 1978 model year Saab automobiles that were assembled at respondent's factory in Malines, Belgium.

PAR. 5. These Belgium-assembled Saabs were subject, in a significant number of instances, to a paint condition which resulted in the incomplete adhesion of the exterior paint to the underlying metal. This paint condition causes the paint later to lift, peel, or blister. The paint condition does not include paint problems or rust caused by accident, normal road hazard, or other external conditions.

PAR. 6. The paint condition described in Paragraph Five is costly to repair and significantly diminishes the economic value of the automobile.

PAR. 7. On or before December 31, 1977, respondent knew or should have known that a significant number of its Belgium-assembled Saab automobiles were subject to the paint condition described in Paragraphs Five and Six.

PAR. 8. Even after respondent knew or should have known that a significant number of Belgium-assembled Saab automobiles were subject to the paint condition described in Paragraphs Five and Six, respondent failed to disclose to prospective purchasers of Belgium-assembled Saab automobiles, facts about the existence, nature, extent, likelihood of occurrence, or cost of correcting the paint condition.

PAR. 9. The facts described in Paragraph Eight would have been material to many purchasers because such facts, if known, likely would have affected their decisions concerning the purchase of Saab automobiles. Absent disclosure of these facts, purchasers could not otherwise reasonably determine that the paint condition was likely to occur or take action to avoid the economic injury attendant to the paint condition.

PAR. 10. Respondent's failure to disclose the material facts described in Paragraph Eight, above, to purchasers of Saab automobiles has and has had the capacity and tendency to mislead members of the public, particularly those who purchased Belgium-assembled Saab automobiles after December 31, 1977.

PAR. 11. Respondent's actions described above have caused substantial and ongoing injury to consumers that is not outweighed by countervailing benefits to consumers or competitors and is not reasonably avoidable by consumers.

PAR. 12. The acts and practices of respondent in failing to disclose

material facts as alleged above were and are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Saab-Scania of America, Inc. (Saab) is a corporation organized, existing and doing business under the laws of Connecticut, with its office and principal place of business located at Saab Drive, Orange, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions shall apply:

1. *Saab* means Saab-Scania of America, Inc., its successors and assigns.

2. *Saab-Scania AB* means Saab-Scania AB, of Sweden, the parent corporation of Saab-Scania of America, Inc.

3. *Motor vehicle* means a passenger car.

4. *Belgian Saab* means a Saab motor vehicle that was assembled at the factory of Saab-Scania AB in Malines, Belgium and that was delivered to the first retail purchaser on or after January 1, 1978, as indicated by the date the warranty period began according to Saab's records.

5. *Paint condition* means the incomplete adhesion of the exterior paint to the underlying metal of a Belgian Saab causing the paint later to lift, peel, or blister. This term does not include paint problems or rust caused by accident, normal road hazard, or other external conditions.

6. *Repair* means the performance of all tasks necessary to restore completely the area where the paint condition exists, whether visibly or latently. The repair includes, but is not necessarily limited to, stripping the paint on the exterior surface of the motor vehicle to the sheet metal surface; correcting all rusting; and preparing, priming and repainting the surface in a color matching the exterior body color.

7. *Complete repair* is a repair which was performed by Saab at no charge to the owner and which was valued at $800 or more according to Saab's records.

8. *Person* means any individual, partnership, corporation, firm, trust, estate, cooperative, association, or other entity.

9. *Dealer* means any person who, pursuant to a sales and service agreement with Saab, purchases or receives on consignment motor vehicles from Saab for resale or lease to the public, including any dealer owned or operated by Saab.

10. *Months-in-service* is calculated as beginning on the date on which Saab or a dealer delivered the motor vehicle to the first retail purchaser.

11. *Warranty period* means the first twelve months-in-service.

12. *Owner* means any person who lawfully acquired custody and/or possession of a Belgian Saab within the vehicle's first 36 months-in-service. This term includes, but is not limited to, any past or current registered owner or person acting on such owner's behalf. This term does not include a dealer or person in temporary possession of the vehicle by right of a lien.

13. *Original owner* means that owner who was the first retail purchaser.

14. *Subsequent owner* means any owner who owned a Belgian Saab after the original owner.

15. *Attorney General settlement* means any formal or informal agreement with the Attorneys General of the states of Maine, Massachusetts, or Vermont.

I.

It is ordered, That respondent, Saab-Scania of America, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution in the United States of any motor vehicle, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to:

NOTIFICATION

A. Identify owners to be notified of their potential eligibility for repair of the paint condition and/or reimbursement for past repairs to correct the paint condition, as specified below:

1. Each original owner shall be notified except: a) any owner who has received a complete repair of the paint condition or b) any owner who purchased his/her Belgian Saab in a state in which there was an Attorney General settlement; and

2. Saab will use its own records to obtain the names and addresses of original owners to be notified;

B. Within sixty (60) days after the date of the service of this order, send, by first-class mail in an envelope on which is disclosed the vehicle identification number (VIN), to each original owner, as identified in Paragraph I.A., a self-addressed, postage pre-paid envelope and a copy of the Notice Package (using the exact language and format used in Attachment A) which shall include: a) one (1) copy of the "Notice of Program to Determine Eligibility for Free Repair or Reimbursement," b) one (1) copy of the "Request Form" and c) one (1) self-addressed, postage pre-paid postcard;

C. Within thirty (30) days of an inquiry or sixty (60) days after the date of service of this order, whichever is later, send the Notice Package to each owner of a Belgian Saab who inquires of Saab or one of its dealers about Saab's program for repair and reimbursement due to the paint condition; however, it shall not be necessary to mail the

Notice Package if the owner states that the paint condition did not appear within the first 36 months-in-service or that he/she did not own the Belgian Saab within the first 36 months-in-service or that he/she previously received a complete repair;

D. Within thirty (30) days of identification, send a copy of the Notice Package and return envelope, as described in Paragraph I.B., by first class mail to each subsequent owner of a Belgian Saab that has been identified by an original owner as having been sold within the first 36 months-in-service or within an unspecified time; *provided*, that, if the original owner fails to specifically or completely identify the subsequent owner by name and/or address, Saab shall expeditiously attempt to identify the name and address of the current owner of that Belgian Saab, based on the Vehicle Identification Number, using either Saab's corporate or dealer records or state motor vehicle records and send the Notice Package to that address within thirty (30) days of identifying the current owner;

E. For any Notice Package (other than those sent pursuant to Paragraph I.F.) that is returned to Saab as being undeliverable, make a reasonable attempt to obtain the original owner's present address and send the Notice Package and return envelope by first class mail to that address; however, if unable to locate the original owner, send the Notice Package and return envelope by first class mail to the person identified as the current owner of that Belgian Saab based on the Vehicle Identification Number in Saab's corporate or dealer records, and, if unable to so identify and locate the current owner, take additional steps to make a reasonable attempt to obtain the current owner's present address and send the Notice Package and return envelope by first class mail to that address; however, such additional attempts need not include use of a commercial locator service except as provided in Paragraph I.F.;

F. Use a commercial locator service to endeavor to obtain correct addresses and locate owners if, at any time within ninety (90) days of the date the Notice Packages were sent, as provided in Paragraphs I.B. and I.D., Saab learns from dealers, the United States Postal Service, or otherwise that the Notice Packages have not been or will not be delivered to twenty percent (20%) or more of the number of owners eligible pursuant to Paragraph I.A.;

INSPECTION

G. Within sixty (60) days after the owner submits the Request Form to Saab requesting an inspection, schedule and perform inspections of each Belgian Saab for which:

1. the owner has completed and mailed to Saab the Request Form

requesting inspection/repair within sixty (60) days after Saab sent the Notice Package to this owner;

2. the owner can provide reasonable proof that he/she owned and/or legally possessed the Belgian Saab within its first 36 months-in-service; and

3. the owner has stated in a signed statement that the paint condition occurred within the first 36 months-in-service;

H. Have a representative of Saab conveniently available to the owner to arrange for inspections and repairs, to review documentation, and to determine eligibility for repair;

REPAIR

I. Determine which owners are eligible for repair based upon the following criteria:

1. the owner owned the Belgian Saab within the first 36 months-in-service;

2. the paint condition occurred within the first 36 months-in-service;

3. the owner owned the Belgian Saab at a time when the paint condition occurred;

4. the owner has not previously received a complete repair; and

5. the original owner did not purchase the Belgian Saab in Massachusetts;

J. Except as provided in Paragraphs I.K. and I.M., send by first class mail within thirty (30) days after the inspection, described in Paragraphs I.G. through I.H., to each owner whose Belgian Saab was inspected, a letter informing the owner whether he/she is eligible for repair, and if not eligible, the reasons therefor, which letter shall contain the following:

1. If the owner's Belgian Saab is eligible for repair: a) what Saab will do to repair the paint condition; b) when Saab will provide repair, which shall not be at a time greater than sixty (60) days after receipt of the owner's request for repair following Saab's notification to the owner of his/her eligibility; c) where the repair will be provided, whether at a dealership or other location convenient to the owner; d) how the owner can arrange the date and time for the repair, or set the date and time for the repair with allowance for change by the owner if necessary; e) how long the owner has to respond and request repair, but this period shall not be less than thirty (30) days from the date the owner receives this letter nor more than forty-five (45) days after Saab sends it; and f) whom the owner should contact with questions about the repair procedure, with appropriate telephone number(s) and address(es); and

2. If Saab rejects the request for repair: a) the reason(s) why the request was rejected and (b) instructions on how the owner can seek reconsideration of the rejection by Saab within forty-five (45) days of the date Saab mails this letter rejecting the repair request;

K. At its option, authorize dealers to arrange for performing repairs simultaneously with or immediately following the inspection; provided that such arrangements shall be at a time and place mutually convenient to the owner and the dealer, and if such arrangements are not made at the time of inspection, comply with the notification requirements as set forth in Paragraph I.J.;

L. Repair the paint condition on each eligible Belgian Saab at no cost to the owner within sixty (60) days after the owner requests an appointment for repair following Saab's notification to the owner of his/her eligibility; provided that:

1. the owner has not accepted any offer of cash settlement made by Saab, as set forth in Paragraph I.M., if Saab makes such an offer; and

2. Saab shall not be responsible or liable under this order for repair costs in excess of $2000.00 per Belgian Saab;

CASH SETTLEMENT

M. At Saab's option, offer the owner a cash settlement in lieu of repairs, as follows:

1. Any offer for a cash settlement shall be made to the owner in writing and shall be sent by first class mail to the owner, in duplicate, within thirty (30) days after the inspection and include a self-addressed, postage-paid envelope;

2. The offer shall explain that the owner may accept the cash settlement by signing and returning one (1) copy of the written offer within thirty (30) days in the envelope provided;

3. Saab may determine the amount of the cash settlement, but the letter, as described in Paragraph I.M.2., must include: a) an explanation that accepting the cash settlement nullifies the owner's right to a free repair; b) what Saab would do to repair the paint condition if the owner does not accept the cash settlement and the other information as required by Paragraph I.J. 1. and 2.; c) Saab's estimate of the cost of repairing the vehicle if the owner has the repair made on his/her own; and d) instructions on how to obtain the cash settlement;

4. If the owner accepts Saab's offer, Saab shall send the cash settlement within thirty (30) days of receiving the owner's acceptance;

5. If the owner does not accept the offer within the later of thirty (30) days after the owner receives it or forty-five (45) days after Saab sends it, Saab shall perform its obligations to repair, as set forth in Paragraph I.L. as if no cash settlement had been offered;

RECONSIDERATION OF REJECTION

N. Within thirty (30) days after an owner requests reconsideration pursuant to Paragraph I.J., review the rejected request and either a) determine that the owner does not qualify for repair and send to the owner by first class mail a second letter describing the reason(s) for the rejection; or b) determine that the owner does qualify for repair and notify the owner and provide repairs as set forth in Paragraphs I.J. and I.L. or offer cash settlement as set forth in Paragraph I.M.;

REIMBURSEMENT

O. Determine which owners are eligible for reimbursement for past repairs based upon the following criteria:

1. the paint condition occurred within the first 36 months-in-service;

2. the owner owned the Belgian Saab within the first 36 months-in-service;

3. initial repair(s) was (were) attempted within the first 42 months-in-service;

4. the owner has not previously received a complete repair;

5. the original owner did not purchase the Belgian Saab in Massachusetts;

6. the owner provides adequate documentation of the amount of expenses incurred and evidence that the expenses incurred were due to the paint condition; provided that a) such documentation and evidence shall include but is not limited to itemized receipts for work done by dealers, auto body shops, or other providers of repairs; or cancelled checks paid to dealers, auto body shops, or other providers of repairs if accompanied by related evidence of prior contact with Saab or a dealer regarding the paint condition; or other records reasonably demonstrating that the owner's Belgian Saab had the paint condition and was repaired either partially or completely and b) Saab shall instruct its dealers to provide, upon request, copies of repair bills or receipts for repairs performed by or through a dealer to assist the owner in obtaining documentation; and

7. the owner's request for reimbursement is mailed within sixty (60) days after the date Saab sent the Notice Package to this owner;

P. Within thirty (30) days after the owner has returned to Saab the Request Form requesting reimbursement and submitted evidence of repair expenses, as described in Paragraph I.O.4., reimburse in person or by first class mail each eligible owner of a Belgian Saab for all reasonable repair expenses (not to exceed $2,000.00) incurred for attempts to eliminate the paint condition, whether or not they eliminated the condition;

Q. In each instance where Saab rejects an owner's request for reimbursement or reimburses an amount less than the amount requested, provide the owner, in writing, within thirty (30) days after Saab receives the owner's request for reimbursement: 1) the specific reasons for the decision; and 2) how the owner may seek reconsideration by Saab;

LIMITATIONS

R. In the event that an owner (or owners) qualifies for both repair and reimbursement, provide free repairs and reimbursement as outlined in Paragraphs I.L. and I.P.; however, Saab shall not be responsible or liable under this order for a total of reimbursement and repair costs in excess of $2000.00 per Belgian Saab, and if the total amount for which the owner(s) would be eligible would exceed $2000.00, offer the owner(s) the choice of how to allocate the money as between repair and reimbursement;

S. Saab shall have no obligations under this order

(1) to any owner who has received a Notice Package from Saab, unless the owner has notified Saab of a request for inspection, repair, or reimbursement within sixty (60) days of the owner's receipt of the Notice Package; or

(2) to any owner who has not received a Notice Package from Saab, unless the owner has requested information from Saab concerning inspection, repair, or reimbursement related to the paint condition within 240 days from the date of Saab's initial mailing of the Notice Package to original owners pursuant to this order.

II.

NOTICE TO DEALERS

It is further ordered, That, within twenty (20) days after the date of service of this order, Saab shall:

A. Provide to every dealer a copy of the "Notice to Dealers" as provided in Attachment B to this order; and

B. Notify all dealers in writing to forward owner inquiries, as described in Paragraph I.C., to Saab within five (5) business days after the owner inquires.

III.

It is further ordered, That for three (3) years after the date of service of this order, Saab shall maintain and upon request make available

to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with this order, including but not limited to:

A. a log stating the name and address of each owner sent the Notice Package, the date on which the Notice Package was sent, the date of any response(s), and the nature and date of Saab's ultimate disposition of the owner's request for repair or reimbursement;

B. copies of all correspondence and other communications to, from, or concerning any such owner;

C. the name and last known address of each original owner known to Saab who was not sent a Notice Package and the reason why the Notice Package was not sent; and

D. all documents relied upon, or concerning, any decision by Saab about inspecting, repairing, or offering a cash settlement for the paint condition.

IV.

It is further ordered, That Saab shall notify the Commission at least thirty (30) days prior to any change in its corporate structure, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That Saab shall, within 65 days and 510 days after the date of service of this order, file with the Commission reports, in writing, setting forth in detail the manner and form in which it has complied with this order.

ATTACHMENT A

Notice Of Program To Determine Eligibility for
FREE REPAIR or REIMBURSEMENT

[DATE SENT]

Dear Saab Owner:

You may be eligible for a free repair or reimbursement for past repairs if your Saab developed a particular paint condition that occurred on a percentage of Saab automobiles built before 1979. It appears that the paint finish on some Saabs that were assembled in Belgium was not up to the usual high quality of Saab automobiles.

On some of these Belgium-assembled Saabs, the paint may lift or blister, sometimes

causing rust to form. The paint condition was caused by incomplete adhesion of the paint to the sheet metal. This condition is different from rusting that may result from road conditions, such as snow and salt. To repair the paint condition properly, affected body panels should be stripped to the sheet metal surface and prepared, primed and repainted. The paint condition does not affect the performance, operation, or safety of the car.

Because Saab-Scania has a continuing interest in the quality of our cars and the satisfaction of our customers, we have agreed with the Federal Trade Commission that under certain circumstances we will offer free repairs or reimbursement for repairs previously performed at your expense. It will be necessary to inspect your car to determine eligibility for free repairs.

You need not be the original owner or own the car now to be eligible. But, you must meet the following conditions and return the attached form within 55 days of the date of this letter.

YOU MAY BE ELIGIBLE FOR *INSPECTION and FREE REPAIR* IF:

- your car was originally purchased on or after January 1, 1978,
- the paint condition appeared within 36 months after the car was delivered to the first owner, and
- the car was never repaired or a partial repair was attempted and the condition reoccurred.

IF YOU REQUEST *INSPECTION AND FREE REPAIR:*

- Please complete the enclosed form and send it to us within *55 days* of the date of this letter.
- We will get back to you within 60 days of receiving your completed form with the results of our review.
- We may then schedule a date for inspection of your car at a Saab dealer in your area.
- Within 30 days after the inspection, we will tell you whether and how your car will be repaired.

YOU MAY BE ELIGIBLE FOR *REIMBURSEMENT* IF:

- your car was originally purchased on or after January 1, 1978,
- the paint condition appeared within 36 months after the car was delivered to the first owner, and
- you paid for a repair that was performed within the first 42 months.

IF YOU REQUEST *REIMBURSEMENT*:

- Please complete the enclosed form and send it to us, with copies of all your supporting documentation, within *55 days* of the date of this letter.
- We will get back to you within 30 days of receiving your completed form with the results of our review.

- If we approve your request, in whole or in part, we will include a check for your reimbursement.

- If we do not approve your request, in whole or in part, we will tell you the specific reasons for our decision.

If you believe you qualify for repair, reimbursement or both, please complete and sign the enclosed form and return it to us in the return envelope we have provided for your convenience. To be eligible for free repair or reimbursement, *you must return the form with any necessary documents within 55 days of the date of this letter.*

If you have any questions about this letter or Saab's offer, please call us at 203–795–5671 and ask to speak to our National Consumer Relations Coordinator.

Very truly yours,
Saab-Scania of America, Inc.

/s/Alex S. Lieuwma
National Service Manager

P.S. In order to be sure we reach all Saab owners who may be eligible for repair or reimbursement, we need your help. *If you sold your Saab within the first 36 months, and you are not seeking reimbursement* for repairs made while you owned the car, *please send us the name and address of the person you sold the car to* and the approximate date on which you sold the car. You may use the enclosed postage-paid postcard, to let us know that you sold your car. Even if you don't know the buyer's name or address, please return the card indicating that the car was sold within the first 36 months. Thank you for your assistance.

[REQUEST FORM]

SAAB-SCANIA OF AMERICA, INC.

Request for Inspection/Repair or Reimbursement for the Cost of Repair of Paint Conditions on Belgian-assembled Saabs

(Please return this form within 55 days.)

Name _____

Address _____

_____

Vehicle Identification Number (VIN)_____ (The VIN is the number written on the envelope next to your address.)

1. When did you purchase your Saab? _____
2. From whom did you purchase your Saab?
   Name: _____
   Address: _____
   _____
3. Since you bought your Saab, either new or used, has the paint peeled or blistered:
   yes _____ no _____
4. If the paint peeled or blistered, please answer the following questions. (If the paint has *not* peeled or blistered, please use the attached postcard instead of this form.)

a) When did the peeling or blistering first occur? _____

month year

b) Please describe the extent and location of the peeling or blistering. _____

_____

_____

_____

_____

c) Did you try to have the condition repaired?

yes _____ no _____

5. If you tried to have the condition repaired, please answer the following questions.

a) When were the repairs done? _____

month year

b) Who did them?

Name: _____

Address: _____

_____

c) Did you pay any money attempting to have the condition repaired?

yes _____ If yes, how much did you pay? $_____

no _____

d) Have you been reimbursed by Saab or the dealer for any of this cost?

yes _____ If yes, when? _____ How much? $_____

no _____

6. Has the paint condition reoccurred on any portion of the car?

yes _____ no _____

7. If the paint condition reoccurred, please answer the following questions.

a) When did it reoccur? _____

month year

b) Please describe the extent and location of any peeling or blistering. _____

_____

_____

_____

_____

c) Did you try to have the condition repaired?

yes _____ no _____

8. If you tried to have the paint condition repaired, please answer the following questions:

a) When were the repairs done? _____

month year

b) Who did them?

Name: _____

Address: _____

_____

c) Did you pay any money attempting to have the condition repaired?

yes _____ If yes, how much did you pay? $_____

no _____

d) Have you been reimbursed by Saab or the dealer for any of this cost?

yes _____ If yes, when? _____ How much? $_____

no _____

9. If you paid for repairs and were not reimbursed, you may be eligible for reimbursement.

Please supply copies of the following documents if you have any of them:

a) Repair orders, letters or other written records to or from any Saab dealer, Saab-Scania of America, Inc., and any government or consumer organization, or others discussing the paint condition and the date it occurred.

and

b) Paint repair bills or invoices showing the date of repair, a description of the repair and the actual cost of the repair.

If you do not have all of the forms mentioned, send copies of whatever relevant records you do have. The repair shop or dealer may have copies of bills, and you may be able to get copies from them.

You may be eligible for reimbursement even if you no longer own your Saab.

10. If you own a Saab in which the paint condition occurred during the first 36 months and the *condition is still unrepaired,* you may be eligible for free repair of the condition. If you are in this category and would like Saab to inspect your car to determine if it is eligible for free repair, please tell us the name and address of the dealer most convenient for you.

Dealer Name: _____

Address: _____

11. If you have sold your Saab, please provide the approximate date on which you sold it and the name and address, if you know them, of the person to whom you sold it.

Date Saab Sold: _____

Buyer's Name: _____

Address: _____

_____

The above information is accurate to the best of my knowledge.

_____

Your signature

_____

Date

Thank you for filling out and returning this form. If you have requested free repair, we will let you know within 60 days whether you qualify for inspection and, if so, schedule an inspection date. If you have requested reimbursement, we will respond to you within 30 days.

Very truly yours,
Saab-Scania of America, Inc.

/s/Alex S. Lieuwma
National Service Manager

[separate postcard]

_____

1) Your Name: _____

Address: _____

Vehicle Identification Number (VIN) _____

(The VIN is the number written on the envelope next to your address.)

2) If you have sold your Saab, please provide the approximate date on which you sold it and the name and address, if you know, of the person to whom you sold it.

Date Saab Sold: _____
Buyer's Name: _____
Address: _____

(Please return this card even if you don't know the name of the person who bought your Saab. Just write in the approximate date on which you sold it.)

3) If you own your Saab and the paint condition has *not* occurred, please check here. ____

Thank you.

ATTACHMENT B

Dear Dealer:

I am writing to inform you of an agreement which Saab-Scania of America, Inc. has entered into with the Federal Trade Commission. This agreement relates to a particular paint condition that developed on some model year 1976 through 1978 Saab automobiles that were assembled in Malines, Belgium. As you know, that factory was closed in 1978.

On some of these Belgium-assembled Saabs, the paint may lift or blister, sometimes causing rust to form. The paint condition was caused by incomplete adhesion of the paint to the sheet metal. This condition is different from rusting that may result from road conditions, such as snow and salt. To repair the paint condition properly, affected body panels should be stripped to the sheet metal surface and prepared, primed and repainted. The paint condition does not affect the performance, operation, or safety of the car.

Because Saab-Scania has a continuing interest in the quality of our cars and the satisfaction of our customers, Saab-Scania has agreed with the Federal Trade Commission that under certain circumstances Saab-Scania will offer free repairs or reimbursement for repairs previously performed at the owner's expense. Saab-Scania has reached this voluntary agreement for settlement purposes only, and does not believe that the FTC Act has been violated.

Generally the agreement provides that a Belgium-assembled Saab is eligible for inspection by a Saab-Scania representative (District Service Manager) and free repair if:

- the car was originally purchased on or after January 1, 1978,
- the paint condition appeared within 36 months after the car was delivered to the first owner,
- the current owner requesting repair is either the original owner of the car or has owned the car since sometime during the first 36 months after the car was delivered to the first owner,
- the car was never repaired, or partial repair was attempted and the condition reoccurred.
- the car was not originally purchased in Massachusetts, and therefore was not included in a prior voluntary agreement entered into in that state.

Put only in letter to Mass. dealers

Generally, the agreement further provides that an owner is eligible for reimbursement for expenses incurred in repairing the condition in the past if:

- the car was originally purchased on or after January 1, 1978,
- the paint condition appeared within 36 months after the car was delivered to the first owner,
- the owner requesting reimbursement owned the car sometime during the first 36 months (regardless of whether the owner still owns the car) and paid for a repair that was performed within the first 42 months,
- the owner requesting reimbursement did not already receive a complete repair (that is, at a cost to Saab-Scania of $800 or more) free of charge,
- the car was not originally purchased in Massachusetts.

put only in letter to Mass. dealers

An owner may qualify for both repair and reimbursement.

Saab-Scania is identifying original owners of Belgium-assembled cars purchased on or after January 1, 1978 and will be sending information directly to these owners about Saab-Scania agreement. An owner seeking inspection/repair or reimbursement will be required to complete a Request Form which will be included in the Notice Package sent by Saab-Scania to the owner.

All determinations of eligibility for inspection, repair and/or reimbursement will be made by Saab-Scania.

If an owner contacts you for information about eligibility for inspection, possible free repair or reimbursement, please refer the owner to our National Consumer Relations Coordinator at Saab-Scania in Orange, and tell the owner that you will pass along the owner's name to Saab-Scania. We are requesting that all dealers notify Saab-Scania of the owner's name within 5 days after the owner makes such an inquiry. The National Consumer Relations Coordinator can be reached at 203–795–5671 or by writing to her at Saab-Scania, on Saab Drive, Orange, CT 06477.

Very truly yours,

/s/Alex S. Lieuwma
National Service Manager

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8641. Order, June 9, 1970—Modifying Order, May 22, 1986

The Federal Trade Commission has modified a 1970 order with American Home Products Corp. (77 F.T.C. 726) by removing some restrictions on the company's advertising for Preparation H. The modified order allows respondent to use in its advertising any claims that the Food and Drug Administration has tentatively approved.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On January 21, 1986, American Home Products Corporation (Petitioner) filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, and Paragraph III of the order in question to reopen the proceeding and modify the final cease and desist order entered against it by the Commission on June 9, 1970, in Docket No. 8641 (77 F.T.C. 726).

The final order in this matter was the product of extended litigation concerning therapeutic advertising claims for Preparation H Ointment or Suppositories. The order effectively proscribes all therapeutic advertising claims for Preparation H Ointment or Suppositories, or any other non-prescription drug product for the treatment or relief of hemorrhoids or any of its symptoms, except for three specifically enumerated claims. The three claims permitted under the order are (1) that the use of the product will help reduce swelling of hemorrhoidal tissue caused by edema, infection, or inflammation; (2) that the use of the product will help reduce swelling of hemorrhoidal tissue by lubricating the affected area; and (3) that use of the product will afford temporary relief of pain and itching of hemorrhoidal tissue in many cases. The order concludes with a proviso (Part III) that if the Food and Drug Administration (FDA) should approve for such products any other claims as permissible in labeling, respondent may petition for a modification of the order on that ground.

Subsequently, the Food and Drug Administration (FDA) undertook a comprehensive review of the safety and effectiveness of over-the-counter (OTC) drug products under the "Drug Amendments of 1962" to the "Federal Food, Drug and Cosmetic Act." As part of this review, the FDA appointed panels of independent experts in medicine and

pharmacology to review the available literature and data and evaluate the safety and effectiveness of ingredients used in OTC products. After completing their evaluations the panels reported their findings and conclusions concerning the classes of OTC products evaluated and recommended appropriate labeling claims for each of the classes of OTC products reviewed. The labeling recommendations are incorporated into proposed monographs which, after a three step procedure designed to determine appropriate revisions, if any, will be promulgated as final monographs or rules which will govern the labeling claims of OTC products. One such panel reviewed and evaluated OTC hemorrhoidal (anorectal) drug ingredients. Its findings and conclusions and recommendations and a proposed monograph for OTC anorectal drugs were published in the Federal Register on May 27, 1980. (45 FR 35575.)

It is this proposed monograph that forms the basis for Petitioner's requested modification. Under this proposed monograph OTC anorectal drug ingredients are classified into several groups on the basis of their pharmacologic action, such as local anesthetics, vasoconstrictors, protectants, and counterirritants. An OTC anorectal drug can be classified as a protectant if, for example, it contains cocoa butter 50 percent or greater per dosage unit or it contains white petrolatum USP 50 percent or greater per dosage unit. An OTC anorectal drug meeting these percentage requirements would be entitled under the proposed monograph to be labeled with certain specific protectant claims.

Petitioner claims that Preparation H Ointment contains 72.8% petrolatum and that Preparation H Suppositories contains 79.5% cocoa butter thereby qualifying those products as protectants under the proposed monograph. As a consequence, Petitioner argues that it should be entitled to make as labeling claims those claims permitted by the FDA under the proposed monograph. However, the Commission's final order prohibits the use of a number of these claims and Petitioner asserts this prohibition places it at a competitive disadvantage with OTC anorectal protectant drug products marketed by others. As a consequence, Petitioner has requested that the final order be modified to allow it to make all advertising claims it is allowed by the proposed monograph to use in its labeling for Preparation H Ointment or Suppositories.

We agree. In prior decisions, we have held that proposed FDA monographs may be relied on as a reasonable basis for performance claims. *AHC Pharmacal, Inc.*, 101 F.T.C. 40, 43 (1983); *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 826 (1984); *Chesebrough-Pond's Inc.*, Docket No. C–602 (November 25, 1985) [106 F.T.C. 567]. Such relief is particularly appropriate where, as here, the advertising claims would

be dependent on their acceptability as labeling claims. Based on the foregoing, we conclude that Petitioner has made the requisite showing for a reopening of the proceeding and a modification of the order under Rule 2.51 and Paragraph III of the final order. Respondent has asked that Part III of the final order. Respondent has asked that Part III of the order be modified to make clear that it may make claims in advertising that the FDA has allowed in labeling.

It is therefore ordered, That the proceeding is hereby reopened and that Paragraph III of the final order issued June 9, 1970, in Docket No. 8641 be, and it hereby is modified to read as follows:

III. This order is not intended to nor does it prohibit respondent from making any representations for non-prescription drug preparations for the treatment or relief of hemorrhoids or any of their symptoms which the Food and Drug Administration has determined, in the course of its over-the-counter drug review, relate to conditions for which the drug preparation is generally recognized as safe and effective and not misbranded. In the event that respondent at any time in the future markets any non-prescription drug preparation for the treatment or relief of hemorrhoids or any of its symptoms for which it desires to make any of the representations now prohibited under Paragraph I of the order, it may petition the Commission for a modification of the order. Such petition shall be accompanied by a showing that the representation is not false or misleading within the meaning of the Federal Trade Commission Act.

Commissioners Oliver and Strenio did not participate.

IN THE MATTER OF

ALBERT SCHNEIDER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3184. Complaint, May 23, 1986—Decision, May 23, 1986

This consent order requires, among other things, a corporate officer of Cellular Capital Corporation to cease making misrepresentations to induce consumers to purchase application preparation services for the cellular license lottery operated by the Federal Communications Commission. Additionally, respondent is required to make two affirmative disclosures to prospective applicants: (1) that the purchase of a cellular application is a high-risk investment, and (2) that an operating cellular system is unlikely to return any profits to its owners in the first three years of operation.

Appearances

For the Commission: *David C. Fix.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albert Schneider, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual who has his business address at The Eighth Floor, One Erieview Plaza, Cleveland, Ohio.

PAR. 2. Respondent, individually and in cooperation with others, is now and for some time last past has been engaged in the offering for sale of application preparation and filing services in connection with the Non-Wireline Cellular Telephone Lottery (the "lottery") operated by the Federal Communications Commission ("FCC"). The lottery is a random drawing used by the FCC to select the non-wireline applicant in each geographical market who is to be awarded a license to construct and operate a new type of mobile telephone system called a cellular system. From 1981 until the institution of the lottery in 1984, such licenses were awarded on the basis of public hearings.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which is in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. As set forth below, in connection with the sale of his services, respondent has engaged in numerous misrepresentations of material facts and has deceptively failed to disclose material facts.

PAR. 5. Respondent misrepresents, directly or by implication, the likelihood that each of his customers will obtain an FCC cellular telephone license or an interest in such a license through the use of respondent's application preparation and filing services. Respondent represents, *inter alia,* that it is a virtual certainty that each of his customers will obtain such a license or an interest in such a license. In fact, it is unlikely that respondent's customers will obtain such a license or any interest in such a license.

PAR. 6. Respondent falsely represents, directly or by implication, that after only one year, almost one percent of the Baltimore/Washington and Chicago markets had subscribed to the local non-wireline cellular company. In fact, the subscribership in both markets after one year was only a small fraction of a percent.

PAR. 7. Respondent falsely represents, directly or by implication, that the typical cellular telephone system will be profitable in the first year of operation. In fact, a typical cellular telephone system will not be profitable in the first year of operation.

PAR. 8. Respondent falsely represents, directly or by implication, that his customers have a binding commitment from Cellular Capital Corporation (CCC) and Ameritrust Bank to provide necessary funding for construction of a cellular telephone system. In fact, CCC has only nominal assets, and CCC and Ameritrust Bank have merely agreed to consider loan applications from respondent's customers should they be awarded licenses.

PAR. 9. Respondent misrepresents, directly or by implication, the qualifications of Peter T. Lewis and the services provided by his company, Lewis Telecom, Inc., the principal preparer of the applications. Respondent falsely represents, *inter alia,* that Mr. Lewis built the cellular system for the Baltimore market and the telecommunications system for the Pershing missile sites, and that Lewis Telecom, Inc. has done all the engineering for 300 cellular markets and has completed 70% of these applications to date. In fact, Mr. Lewis did not build the cellular system for the Baltimore market or the telecommunications system for the Pershing Missile sites. Lewis Telecom, Inc. did not do all the engineering for 300 cellular markets, nor has it completed 70% of these applications to date.

PAR. 10. The false representations of material facts set forth in

Paragraphs Five through Nine are likely to mislead consumers and induce purchases of defendants' services. These representations thus constitute deceptive and unfair acts or practices prohibited as unlawful by Section 5(a) of the FTC Act.

PAR. 11. Respondent does not disclose that the purchase of his application and preparation services is a high risk investment. This non-disclosure is deceptive in light of respondent's representations that each customer is virtually certain to receive all or part of an extremely valuable cellular telephone license.

PAR. 12. Respondent does not disclose that his assessment of the value of the cellular telephone licenses to be awarded is based on assumptions which are highly optimistic or unfounded. This nondisclosure is deceptive in light of respondent's representations that these cellular telephone licenses are enormously profitable and extremely valuable.

PAR. 13. Respondent does not disclose that treatment of his application purchasing program as a tax shelter is highly questionable and is likely to be disallowed. This nondisclosure is deceptive in light of respondent's representations that, due to the income tax benefits, his customers could not lose money even in the unlikely event that no part of a license was obtained.

PAR. 14. The undisclosed material facts set forth in Paragraphs Eleven through Thirteen are necessary to dispel false assumptions likely to arise in light of stated representations. The failures to disclose such material facts are likely to mislead consumers and induce purchases of defendants services. These failures to disclose thus constitute deceptive and unfair acts or practices prohibited as unlawful by Section 5(a) of the FTC Act.

PAR. 15. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter

executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Albert Schneider is an individual who has his business address at the Eighth Floor, One Erieview Plaza, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondent Albert Schneider, his agents, representatives, brokers, and employees, and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, and each of them, directly or indirectly, in the promotion, offering for sale or sale of any non-wireline MSA cellular telephone system application preparation service, do forthwith cease and desist from the following activities:

(1) Representing, directly or indirectly, that any applicant in the Federal Communications Commission ("FCC") nonwireline cellular telephone license lottery ("lottery") is certain or substantially certain to obtain all or part of a cellular telephone license ("license"), or otherwise misrepresenting the likelihood that an applicant will obtain all or part of a license;

(2) Representing, directly or indirectly, that past agreements to share licenses (settlement agreements) entered into by applicants in the second and third tiers of the FCC lottery provide a basis for

concluding that future applicants in the FCC lottery are likely to receive an interest in a license through similar agreements;

(3) Misrepresenting, directly or indirectly, the value or profit potential of a license awarded through the FCC lottery. At the time of making any representation of value or profit potential, defendant must possess and rely upon a reasonable basis for the representation consisting of competent and reliable data;

(4) Misrepresenting, directly or indirectly, past or current profit performance of cellular telephone systems; or making any representation regarding past or current profit performance of cellular telephone systems unless at the time of making such representation defendant possesses and relies upon a reasonable basis consisting of competent and reliable data;

(5) Misrepresenting, directly or indirectly, any financing arrangements made for purchasers of defendant's application services;

(6) Misrepresenting, directly or indirectly, the nature of the services provided by the application preparers or the qualifications of those providing technical services;

(7) Misrepresenting, directly or indirectly, any material fact relevant to a customer's decision to purchase application preparation services for the FCC lottery; and

(8) Making any representations with respect to income tax benefits available to purchasers of defendant's products or services other than to refer the prospective applicant to their own tax accountant or attorney.

II.

It is further ordered, That respondent Schneider, his agents, representatives, brokers and employees, and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise and each of them, directly or indirectly, in the promotion, offering for sale or sale of any non-wireline MSA cellular telephone system application preparation service are hereby enjoined from failing to disclose to prospective applicants statements (1) and (2) below in all sales brochures, in every oral presentation, and on the front page of all sales or service contracts or agreements with ultimate consumers:

(1) "The purchase of an application for the Federal Communication Commission's cellular telephone lottery is a high-risk investment. Do not purchase an application unless you can afford and are prepared to lose all the money invested."

(2) "An operating cellular system is unlikely to return any profits to its owners in at least the first three years of operation."

It is further ordered, That the statements required above shall be set forth in a clear and conspicious manner in print at least as large as the capitalized corporate name within the text of the brochure, contract or agreement then used by the defendant(s), but in no event smaller than 10 point type; that such disclosure shall be in 100% black ink against a light background, and boxed; that the copy of the foregoing statements set forth on the front page of each sales or service agreement or contract shall be preceded by the heading "RISK FACTORS YOU SHOULD CONSIDER PRIOR TO PURCHASE", and shall also include a signature line for the customer preceded by a declaration that the customer has read and understands the statement; and that no agreement or contract shall be deemed valid or complete unless the customer has signed and dated the required declaration.

III.

It is further ordered, That respondent Schneider shall fully comply with the Paragraphs IV and VII of the Consent Decree and Permanent Injunction entered by the United States District Court for the Northern District of California in the case *Federal Trade Commission v. The Cellular Corporation, et al.* (Civ. No. C85–8231 WHO), which paragraphs are attached hereto and incorporated herein.*

IV.

It is further ordered, That this settlement agreement is premised on the sworn financial statements of respondent Schneider previously provided to the Commission. If the Commission finds any material misstatement or misrepresentation in the sworn financial statements, that finding shall cause this order to be set aside and the Commission in that event shall be permitted to reopen this matter and proceed against respondent Schneider to the full extent of any possible monetary liability he may have for the acts and practices alleged in the Commission's complaint in this matter in excess of the liability imposed herein. Prior to the making of any such motion, the Commission will notify respondent Schneider of any alleged discrepancy and provide him with a reasonable opportunity to explain or justify the disputed entry.

* Not reproduced herein. Copies of all attachments are available from the Commission's Public Reference Branch, H–130, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

V.

It is further ordered, That respondent Schneider shall immediately provide a copy of this order to each officer, employee, sales representative, or independent contractor engaged in the promotion or sale of respondent's non-wireline MSA cellular telephone system application preparation services.

VI.

It is further ordered, That respondent Schneider shall, within sixty (60) days after the order is approved by the Commission, file with the Federal Trade Commission a report setting forth in detail the manner and form in which he has complied with this order.

Commissioners Oliver and Strenio did not participate.

IN THE MATTER OF

JOHN C. ANDERSON

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3185. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that John C. Anderson, individually and as a former partner trading and doing business as Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. John C. Anderson is a former partner of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. John C. Anderson, together with others, formulated, directed and controlled the acts and practices of said business, including the acts and practices alleged in this complaint. His address is 18665 Marsha, Riverview, Michigan.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a

person's credit profile by removing negative information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

PAR. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

PAR. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . can challenge negative entries on your credit profile and improve your credit rating.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .

2. Credit Establishing Bureau will dispute all negative entries on client's credit profile. . . .

3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.

4. Credit Establishing Bureau agrees to improve client's profile, or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

PAR. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

PAR. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

PAR. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

PAR. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

PAR. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for their clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank

through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

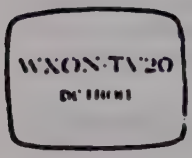
E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

PAR. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

PAR. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

EXHIBIT 1



WXON-TV, INC.

Client CREDIT ESTABLISHING BUREAU
Date
Length
Writer
Remarks

VIDEO	AUDIO
	NO CREDIT? CREDIT PROBLEMS? NO PROBLEM! STOP BEING REJECTED TIME AND TIME AGAIN. WE AT THE "CREDIT ESTABLISHING BUREAU" ARE HERE TO HELP. OUR COUNSELORS CAN HELP YOU GET MASTER AND VISA CREDIT CARDS. IF YOU HAVE BAD CREDIT, WE CAN CHALLENGE NEGATIVE ENTRIES ON YOUR CREDIT PROFILE, AND IMPROVE YOUR CREDIT RATING IF YOU NEED TO ESTABLISH OR RE-ESTABLISH YOUR CREDIT, YOU NEED HELP! FOR CREDIT HELP CALL 559-9404 GET THE CREDIT YOU DESERVE!

EXHIBIT 2

ACCOUNT CREDIT ESTABLISHING BUREAU

LENGTH :30 DATE 11/14/83-11/17/83

WRITTEN BY

PRODUCTION INSTRUCTIONS:

AGENCY ADDRESS:

CREDIT ESTABLISHING BUREAU
17344 W. 12 MILE ROAD
Suite 103
SOUTHFIELD, MICHIGAN 48075
ATT: G. Tannous

MUSIC USED

PRODUCED BY DATE

30 SEC.

THE FOLLOWING IS AN IMPORTANT ANNOUNCEMENT, THERE IS HOPE! IF YOU HAVE NO CREDIT, BAD CREDIT OR IF YOU HAVE DECLARED BANKRUPTCY, CREDIT ESTABLISHING BUREAU IN SOUTHFIELD CAN HELP! THEIR FRIENDLY QUALIFIED COUNSLER CAN GET YOU MASTER & VISA CREDIT CARDS. THE CAN ALSO CHALLENGE NEGATIVE ENTRIES ON YOUR CREDIT PROFILE AND IMPROVE YOUR CREDIT RATIN IF YOU NEED TO ESTABLISH OR RE-ESTABLISH YOU CREDIT, YOU NEED HELP. CALL THEM RIGHT NOW AT 559-9404, THAT'S 559-9404

TOTAL NUMBER OF COMMERCIALS RUN....12

EXHIBIT 1

EXHIBIT 3

CREDIT ESTABLISHING BUREAU

(313) 559-9404
17344 W. 12 Mile Road
Suite 103
Southfield, MI 48076

FULL DISCLOSURE

This agreement made this 2nd day of 25 1983 by and betwee "Credit Establishing Bureau" and the undersigned, hereinafter referred to as client, witness as follow

Whereas, it is the purpose of this agreement to offer full disclosure to the client of the service rendered by Credit Establishing Bureau.

1. Credit Establishing Bureau shall assist in obtaining a credit profile from TRW Credit Data and/or assigned credit reporter on client.
2. Credit Establishing Bureau shall study client's credit profile and determine appropriat actions.
3. Credit Establishing Bureau will dispute all negative entries on client's credit profile fo verification.
4. If negative entries cannot be removed, Credit Establishing Bureau shall write a Statement o Explanation of not more than 100 words for each entry. (Civil Code Section 1785.16FCRA
5. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Cred Reporting Act. (Civil Code Section 611.)
6. Credit Establishing Bureau agrees to improve client's profile, or money back Guarantee

Client hereby agrees to pay the total fee of $ 95.00 to Credit Establishing Burea for services rendered.

Form of Payment Check check # 158

Balance with TRW profile (may not be more than 40% of total amount), approximate date will be two t three weeks from date stated above.

List balance due $ N/A

TRW $125.00 Other reported $ N/A Spouse TRW $200.0
(please check which one will apply)

If client requests another Credit Reporter other than TRW please state the name here. N/A

Client's Signature AGENT

in

EXHIBIT 4

CREDIT ESTABLISHING BUREAU

(313) 559-9404
17344 W. 12 Mile Road
Suite 103
Southfield, MI 48076

CREDIT CARD FULL DISCLOSURE

This agreement on this XVIV day of 25 19 83 by and between "Credit Establishing Bureau" and the undersigned hereinafter referred to as client witness as follow:

Whereas, it is the purpose of this agreement to offer full disclosure to the client of the services rendered by Credit Establishing Bureau in obtaining a Mastercard or Visa credit card.

1. Credit Establishing Bureau shall obtain a credit report from TRW Credit Data on heresaid client.

2. Credit Establishing Bureau shall study client's credit profile and determine appropriate actions.

3. Client understands that if he or she cannot obtain a Mastercard or a Visa credit card on an unsecured basis they will be required to abide by the following procedure:

Submit an official Timesaver application. Once you open and maintain a collateralized savings account of $300.00 or more with Key Federal Saving & Loan of Baltimore, Maryland your Mastercard and/or Visa will be approved and issued. (All banking will be done through post paid mail.) Key Federal Services Incorporated, the financial institute that issues the credit cards, will verify the information on your application and will have final approval to issue the cards. Usually reason for denial will be an unstable credit profile, and could cause for delay. The balance in your savings account at Key Federal Savings & Loan will determine an equal credit limit for each credit card. You can increase your credit limit for each credit card merely by adding to your savings account. Your savings account is federally insured and will earn 5¼% annual interest. Your credit card account will be reviewed every 12 months to determine whether your credit limit can be increased or your savings account can be returned with interest. There is an annual "Bank Action" fee of $25.00 for each card, that will be billed to your credit card statement. Timesaver Incorporated is the exclusive marketing agent for Key Federal Savings & Loan, and Key Financial Services Incorporated. Timesaver charges a one time processing fee of $25.00 which must be paid when you submit your application.

- Credit Establishing Bureau Guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded. (Note: 20% is used in requesting profile, investigation of profile and your agent's commission.)*

Client hereby agrees to pay the total fee of $75.00 to Credit Establishing Bureau for services rendered.

Form of payment Check check # 158

Client's Signature _____ agent _____

int.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent John C. Anderson is a former partner of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. John C. Anderson, together with others, formulated, directed and controlled the acts and practices of said business. His address is 18665 Marsha, Riverview, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's

creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent John C. Anderson, individually and as a former partner of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting

Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent John C. Anderson, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;
2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;
3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;
4. The likelihood of any person obtaining a credit card through their services; or
5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent John C. Anderson shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying all records and documents relating to any credit improvement service or credit card procurement service that he offers to any person for at least three (3) years from the date of such offer, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;

2. Copies of any contracts, disclosure statements or other documents furnished to any person;

3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;

4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and

5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

IV.

It is further ordered, That respondent John C. Anderson and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having advertising, sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his successors and assigns secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent John C. Anderson promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VI.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

IN THE MATTER OF

PETER S. EVERTS

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3186. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Peter S. Everts, individually and as a former employee of Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Peter S. Everts is a former employee of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Peter S. Everts, together with others, directed, managed and supervised the acts and practices of said business, including the acts and practices alleged in this complaint. His address is 1206 Marseilles Street, Rochester, Michigan.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a

person's credit profile by removing negative information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

PAR. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4,* and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

PAR. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . . can challenge negative entries on your credit profile and improve your credit rating.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .

2. Credit Establishing Bureau will dispute all negative entries on client's credit profile. . . .

3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.

4. Credit Establishing Bureau agrees to improve client's profile or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

* *See* pages 442–445. Identical exhibits were used in *John C. Anderson,* Dkt. C–3185.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

PAR. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

PAR. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

PAR. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

PAR. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

PAR. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for their clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

PAR. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

PAR. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Peter S. Everts is a former employee of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Peter S. Everts, together with others, directed, managed and supervised the acts and practices of said business. His address is 1206 Marseilles Street, Rochester, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent Peter S. Everts, individually and as a former employee of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent Peter S. Everts, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;

2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;

3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;

4. The likelihood of any person obtaining a credit card through their services; or

5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent Peter S. Everts shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying all records and documents relating to any credit improvement service or credit card procurement service that he offers to any person for at least three (3) years from the date of such offer, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;

2. Copies of any contracts, disclosure statements or other documents furnished to any person;

3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;

4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and

5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

IV.

It is further ordered, That respondent Peter S. Everts and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having advertising,sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his successors and

assigns secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent Peter S. Everts promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VI.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

IN THE MATTER OF

VICTOR J. HAKIM

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3187. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Victor J. Hakim, individually and as a former partner trading and doing business as Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Victor J. Hakim is a former partner of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Victor J. Hakim, together with others, formulated, directed and controlled the acts and practices of said business. His address is 17010 Edwards, Southfield, Michigan.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing

therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

PAR. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4,* and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

PAR. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . . can challenge negative entries on your credit profile and improve your credit rating.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .

2. Credit Establishing Bureau will dispute all negative entries on client's credit profile. . . .

3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.

4. Credit Establishing Bureau agrees to improve client's profile, or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

* *See* pages 442–445. Identical exhibits were used in *John C. Anderson*, Dkt. C–3185.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

PAR. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

PAR. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

PAR. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

PAR. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

PAR. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for their clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

PAR. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

PAR. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Victor J. Hakim is a former partner of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Victor J. Hakim, together with others, formulated, directed and controlled the acts and practices of said business. His address is 17010 Edwards, Southfield, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent Victor J. Hakim, individually and as a former partner of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent, Victor J. Hakim, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;

2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;

3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;

4. The likelihood of any person obtaining a credit card through their services; or

5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent Victor J. Hakim shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying all records and documents relating to any credit improvement service or credit card procurement service that he offers to any person for at least three (3) years from the date of such offer, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;

2. Copies of any contracts, disclosure statements or other documents furnished to any person;

3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;

4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and

5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

IV.

It is further ordered, That respondent Victor J. Hakim and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having advertising, sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his successors

and assigns secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent Victor J. Hakim promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VI.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

IN THE MATTER OF

JAMES F. HERNDON, JR.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3188. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that James F. Herndon, Jr., individually and as a former partner trading and doing business as Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. James F. Herndon, Jr., is a former partner of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. James F. Herndon, Jr., together with others, formulated, directed and controlled the acts and practices of said business, including the acts and practices alleged in this complaint. His address is 20576 Vaughan, Detroit, Michigan.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a

person's credit profile by removing negative information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

PAR. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4,* and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

PAR. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . . can challenge negative entries on your credit profile and improve your credit rating.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .

2. Credit Establishing Bureau will dispute all negative entries on client's credit profile. . . .

3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.

4. Credit Establishing Bureau agrees to improve client's profile, or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

* See pages 442–445. Identical exhibits were used in *John C. Anderson*, Dkt. C–3185.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

PAR. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

PAR. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

PAR. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

PAR. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

PAR. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for their clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

PAR. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

PAR. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent James F. Herndon, Jr., is a former partner of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. James F. Herndon, Jr., together with others, formulated, directed and controlled the acts and practices of said business. His address is 20576 Vaughan, Detroit, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent James F. Herndon, Jr., individually and as a former partner of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent, James F. Herndon, Jr., his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;

2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;

3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;

4. The likelihood of any person obtaining a credit card through their services; or

5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent James F. Herndon, Jr., shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying all records and documents relating to any credit improvement service or credit card procurement service that he offers to any person for at least three (3) years from the date of such offer, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;

2. Copies of any contracts, disclosure statements or other documents furnished to any person;

3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;

4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and

5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

IV.

It is further ordered, That respondent James F. Herndon, Jr., and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having advertising, sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his succes-

sors and assigns secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent James F. Herndon, Jr., promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VI.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

IN THE MATTER OF

STEVEN M. HULL

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C–3189. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards. Additionally, respondent, as a company founder, is required to provide consumer redress in the form of a six-week consumer education program directed at people with credit problems similar to those of the company's clients.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Bruce Genderson, Williams & Connally,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Steven M. Hull, individually and as a former partner trading and doing business as Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Steven M. Hull is a former partner of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Steven M. Hull, together with others, formulated, directed and controlled the acts and practices of said business, including the acts and practices alleged in this complaint. His address is 2015 North Bush Street, Apt. 108, Santa Ana, California.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or

expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

PAR. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

PAR. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4,* and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

PAR. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . . can challenge negative entries on your credit profile and improve your credit rating.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .

2. Credit Establishing Bureau will dispute all negative entries on client's credit profile. . . .

3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.

4. Credit Establishing Bureau agrees to improve client's profile, or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative

* See pages 442–445. Identical exhibits were used in *John C. Anderson*, Dkt. C–3185.

information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

PAR. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

PAR. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

PAR. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1

through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

PAR. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

PAR. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

PAR. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for their clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

PAR. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

PAR. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and hav-

ing determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Steven M. Hull is a former partner of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. Steven M. Hull, together with others, formulated, directed and controlled the acts and practices of said business. His address is 2015 North Bush Street, Apt. 108, Santa Ana, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent Steven M. Hull, individually and as a former partner of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representa-

tives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent Steven M. Hull, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;

2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;

3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;

4. The likelihood of any person's obtaining a credit card through their services; or

5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent Steven M. Hull shall conduct the following public information program over radio station WJZZ–106 FM, Detroit, Michigan, and in the *Detroit Free Press,* Detroit, Michigan, to inform consumers of misrepresentations that may have been made in connection with the sale of credit improvement services and credit card procurement services: respondent shall purchase from said radio station advertising time for a sixty (60) second radio announcement to be broadcast every Friday after 8:00 P.M., every Saturday between 8:00 A.M. and 8:00 P.M., every Saturday after 8:00 P.M., and every Sunday between 10:00 A.M. and 8:00 P.M., for a continuous six (6) week period to be designated by the Federal Trade Commission. The text of the announcements to be broadcast is attached hereto as Appendix A and Appendix B. Appendix A shall be broadcast on Friday and on Saturday and Appendix B shall be broadcast on Saturday and on Sunday throughout the six (6) week broadcast period. All tapes prepared for use in connection with such announcements must be approved by the Federal Trade Commission prior to their initial broadcast. No modification of the text of the announcements may be made without the prior written consent of the Federal Trade Commission. Respondent shall pay all fees involved in the production and broadcast of the announcements.

Respondent shall also purchase from said newspaper advertising space for one (1) seven (7) line announcement to be published Friday, Saturday, and Sunday in the classified section of said newspaper, under the heading "Financial Offers and Money to Loan" for a continuous six (6) week period to be designated by the Federal Trade Commission. The text of the announcement to be published is at-

tached hereto as Appendix C. No modification of the text of the announcement may be made without the prior written consent of the Federal Trade Commission. Respondent shall pay all fees involved in the production and publication of the announcement.

IV.

It is further ordered, That respondent Steven M. Hull shall maintain for at least three (3) years and, upon request, make available to the Federal Trade Commission for inspection and copying:

A. All records and documents necessary to demonstrate fully his compliance with Part III of this order, including but not limited to:

1. Copies of all contracts entered into for the production and broadcast of the announcements;
2. Copies and records of all communications concerning the text of the announcements and the dates and times that the announcements are to be broadcast; and
3. Evidence of payment for the production and broadcast of the announcements.

B. All records and documents relating to any credit improvement service or credit card procurement service that he offers to any person, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;
2. Copies of any contracts, disclosure statements or other documents furnished to any person;
3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;
4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and
5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

V.

It is further ordered, That respondent Steven M. Hull and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having ad-

vertising, sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his successors and assigns secure from each such person a signed statement acknowledging receipt of said order.

VI.

It is further ordered, That respondent Steven M. Hull promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VII.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

APPENDIX A

The following is a public service message for consumers.

Have you been turned down for credit because of late payments, court judgments, or bankruptcy on your credit bureau report? If so, you should learn what your rights are under federal law.

Under the Fair Credit Reporting Act, you have the right to learn what is in your credit bureau report. And you have the right to challenge any information that is not complete and accurate. But, if the information is accurate, *no one* can require the credit bureau to remove it—unless it is out-dated. The law permits a history of late payments to be reported for 7 years. And bankruptcy may be reported for 10 years.

So don't be misled by ads promising to "clean up" your credit history. Learn what the law allows. For free information about your credit rights, write to: Credit Tips, Federal Trade Commission, Washington, D.C., 20580. The address again is Credit Tips, Federal Trade Commission, Washington, D.C., 20580.

APPENDIX B

The following is a public service message for consumers.

Have you been turned down for credit because you've never had credit before? If so, you know that a good credit history is important. Ads offering "instant credit" or major credit cards regardless of your past credit history may be misleading. Most creditors want to know your credit history *before* giving you credit.

That's why most creditors contact a credit bureau when you apply for credit—they want to learn what your past payment history has been. If the credit bureau has little or no information about you, the creditor may reject your application.

To learn what's in your credit file, check with the credit bureaus in your area. You have the right to do this under the Fair Credit Reporting Act, a federal law. For free information about your credit rights and tips on how to build a better credit history, write to: Credit Tips, Federal Trade Commission, Washington, D.C., 20580. The address again is Credit Tips, Federal Trade Commission, Washington, D.C., 20580.

APPENDIX C

BAD CREDIT? NO CREDIT?
For free information on credit
laws and consumer problems
write Credit Tips, Federal
Trade Commission, Washing-
ton, D.C. 20580

IN THE MATTER OF

GEORGE TANNOUS

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3190. Complaint, May 27, 1986—Decision, May 27, 1986

This consent order prohibits, among other things, a former official of Credit Establishing Bureau, a Detroit-based credit repair clinic that went out of business in February, 1984, from falsely representing in the future that he can improve credit records and arrange for consumers to receive major credit cards. Additionally, respondent, as a company founder, is required to provide consumer redress in the form of a six-week consumer education program directed at people with credit problems similar to those of the company's clients.

Appearances

For the Commission: *Kathleen V. Buffon.*

For the respondent: *Bruce Genderson, Williams & Connally,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that George Tannous, individually and as a former partner trading and doing business as Credit Establishing Bureau, formerly a partnership, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. George Tannous is a former partner of Credit Establishing Bureau ("CEB"), formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. George Tannous, together with others, formulated, directed and controlled the acts and practices of said business, including the acts and practices alleged in this complaint. His address is 1777 ½ West Lincoln, Anaheim, California. Prior to trading and doing business as a partner of CEB in Michigan, George Tannous, as an individual, traded and did business during July and August 1983 as Credit Establishing Bureau, which had its office and principal place of business at 11026 Lower Azusa Road, El Monte, California, and from November 1982 to July 1983, as Credit Establishers, which had its office and principal place of business at 243 Sierra Madre

Villa, Suite 200, Pasadena, California. George Tannous formulated, directed and controlled the acts and practices of these businesses and engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public.

PAR. 2. For purposes of this complaint, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing therein, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of a person in return for the payment of money.

Par. 3. CEB has engaged in the advertising, solicitation, offering for sale and sale of credit improvement services and credit card procurement services to the public by means of newspaper, radio and television advertisements, by direct personal contact with prospective clients, and through letters, contracts and other documents.

PAR. 4. The acts and practices of CEB alleged in this complaint have been in or affecting commerce.

Par. 5. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts and other written documents, examples of which are attached hereto as Exhibits 1 through 4,* and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit improvement service.

Par. 6. Typical of CEB's statements referred to in Paragraph Five, but not necessarily inclusive thereof, are the following:

A. Television and radio advertisements:

1. Credit problems? No problem! Stop being rejected time and again.

2. If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help. Their friendly, qualified counselors . . . . can challenge negative entries on your credit profile and improve your credit rating.

* *See* pages 442–445. Identical exhibits were used in *John C. Anderson*, Dkt. C–3185.

B. Contracts:

1. Credit Establishing Bureau shall assist in obtaining a credit profile. . . .
2. Credit Estabishing Bureau will dispute all negative entries on client's credit profile. . . .
3. Work to be conducted by Credit Establishing Bureau is under the Federal Fair Credit Reporting Act.
4. Credit Establishing Bureau agrees to improve client's profile, or money back Guaranteed.

C. Oral statements to the effect that:

1. CEB can remove bankruptcies, judgments, and other negative information from clients' credit profiles and has done so frequently in the past.

2. Removal of bankruptcies from credit profiles is CEB's specialty.

3. Many people who have had bad credit profiles now have A–1 ratings and are able to obtain credit because of CEB's services.

4. After CEB disputes negative information in a client's credit profile, the credit bureau will remove the information or improve its rating in order to meet the requirements of the Fair Credit Reporting Act.

Par. 7. Through the use of the statements referred to in Paragraph Six, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB sought and obtained credit profiles and performed credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act enabled CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB improved the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB provided refunds to all clients whose credit profiles were not improved by its credit improvement services.

Par. 8. In truth and in fact:

A. CEB did not seek and obtain credit profiles and did not perform credit improvement services on behalf of all clients.

B. The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, which regulates the information that may be reported in a person's credit profile, did not enable CEB to remove adverse information appearing in clients' credit profiles or to improve the rating of such information regardless of its accuracy or date.

C. Through its credit improvement services, CEB did not improve the credit profiles of many clients with bad credit histories regardless of the accuracy or date of the information appearing in the credit profiles.

D. CEB did not provide refunds to all clients whose credit profiles were not improved by their credit improvement services.

Therefore, the representations set forth in Paragraph Seven were and are false and misleading.

Par. 9. In the course and conduct of its business, CEB has made numerous statements in advertisements, contracts, and other written documents, examples of which are attached hereto as Exhibits 1 through 4, and has made numerous oral statements to prospective clients through employees and sales agents for the purpose of inducing the purchase of its credit card procurement service.

Par. 10. Typical of CEB's statements referred to in Paragraph Nine, but not necessarily inclusive thereof, are the following:

A. Advertisements:

If you have no credit, bad credit or if you have declared bankruptcy, Credit Establishing Bureau in Southfield can help! Their friendly, qualified counselors can get you Master & Visa credit cards.

B. Contracts:

Credit Establishing Bureau guarantees that the heresaid client will obtain a Mastercard or Visa credit card or 80% of your total fee will be refunded.

C. Oral statements to the effect that:

1. CEB works in conjunction with a local bank. An agent of CEB will go to the bank on the client's behalf and submit a credit card application. CEB will represent its client to the bank as a creditworthy individual. With CEB's backing, the client has a much better chance of obtaining a credit card.

2. Because of the prospective client's circumstances (*e.g.*, employment, age, length of time in area), CEB will be able to obtain a credit card for him or her on an unsecured basis through a local bank.

3. CEB will refund the fee if it is unable to obtain a credit card on an unsecured basis through a local bank.

Par. 11. Through the use of the statements referred to in Paragraph Ten, and other statements not specifically set forth herein, CEB has made the following material representations, directly or by implication:

A. CEB regularly obtained Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB had an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB performed services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB provided refunds to clients who did not obtain a credit card through its services.

Par. 12. In truth and in fact:

A. CEB did not regularly obtain Master or Visa credit cards on an unsecured basis for its clients regardless of clients' prior credit histories.

B. CEB did not have an established connection with a local bank through which it regularly arranged for the issuance of credit cards on an unsecured basis.

C. CEB did not perform services for all clients that contributed substantially to its clients' ability to obtain a credit card.

D. There was not good reason to believe that CEB's clients would obtain a credit card through its services.

E. CEB, in many instances, did not provide refunds to clients who did not obtain a credit card through its services.

Therefore, the representations set forth in Paragraph Eleven were and are false and misleading.

Par. 13. CEB's aforesaid false and misleading representations have induced persons to pay over to it substantial sums of money for services that CEB could not or did not perform as represented. CEB has received said sums of money and, in a substantial number of instances, has failed or refused to refund such money to such persons. Therefore, the continued retention of said money constitutes an unfair act or practice.

Par. 14. The acts and practices of CEB as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a

copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent George Tannous is a former partner of Credit Establishing Bureau, formerly a partnership, with its office and principal place of business located at 17344 W. 12 Mile Road, Suite 103, Southfield, Michigan. George Tannous, together with others, formulated, directed and controlled the acts and practices of said business. His address is 1777 ½ West Lincoln, Anaheim, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

For purposes of this order, the following definitions shall apply:

A. *Credit Profile* means any written, oral or other communication of information by a consumer reporting agency bearing on a person's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used or collected in whole or in part for the purpose of establishing the person's eligibility for credit;

B. *Credit Improvement Service(s)* means any service to improve a person's credit profile by removing negative information appearing in a credit profile, changing the rating of such information from negative to positive, or otherwise enhancing said credit profile in return for the payment of money; and

C. *Credit Card Procurement Service(s)* means any service to obtain a credit card on behalf of any person in return for the payment of money.

I.

It is ordered, That respondent George Tannous, individually and as a former partner of Credit Establishing Bureau, formerly a partnership, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit improvement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they will seek or obtain any credit profile or will perform any credit improvement service for any person;

2. Any right or remedy available under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.,* including the ability to remove adverse information in any credit profile or to change any rating of such information from negative to positive;

3. That they can or will improve the credit profile of any person regardless of the accuracy or date of the information appearing in the credit profile; or

4. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

C. Participating in any dispute or encouraging any person to engage in any dispute with any consumer reporting agency, pursuant to procedures authorized by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. 1681i, over the accuracy or completeness of any item of information in any credit profile when they know or have reason to know, from information provided by the client or otherwise, that the item of information in the credit profile is accurate and complete.

II.

It is further ordered, That respondent George Tannous, his successors and assigns, and his officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, solicitation, offering for sale, sale or performance of any credit card procurement service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or by implication:

1. That they can or will obtain a credit card or other extension of credit on an unsecured or any other basis;

2. That they have any connection with any bank, credit card issuer or any other entity through which they can or will arrange for the issuance of credit cards or for the extension of credit;

3. That they can or will perform services for any person that will contribute in any way to that person's ability to obtain a credit card;

4. The likelihood of any person's obtaining a credit card through their services; or

5. That they will refund in whole or in part any fee paid by any person and the conditions upon which they will do so.

B. Offering to any person, directly or by implication, any money-back or satisfaction guarantee unless with each such offer the identity of the guarantor and all the terms and conditions of the guarantee are clearly and prominently disclosed and unless they promptly and fully honor each such guarantee offered.

III.

It is further ordered, That respondent George Tannous shall conduct the following public information program over radio station WJLB–98 FM, Detroit, Michigan, to inform consumers of misrepresentations that may have been made in connection with the sale of credit improvement services and credit card procurement services: respondent shall purchase from said radio station advertising time for a sixty (60) second radio announcement to be broadcast each day between 6:00 A.M. and 8:00 P.M., Monday through Friday, and between 10:00 A.M. and 8:00 P.M., Saturday and Sunday, for a continuous six (6) week period to be designated by the Federal Trade Commission. The text of the announcements to be broadcast is attached hereto as Appendix A and Appendix B.* Appendix A shall be broadcast on the first day of the six (6) week broadcast period and on

* *See* pages 486–487. Identical Appendices A and B were used in *Steven M. Hull,* Dkt. C–3189.

alternate days thereafter. Appendix B shall be broadcast on the second day of the six (6) week broadcast period and on alternate days thereafter. All tapes prepared for use in connection with such announcements must be approved by the Federal Trade Commission prior to their initial broadcast. No modification of the text of the announcements may be made without the prior written consent of the Federal Trade Commission. Respondent shall pay all fees involved in the production and broadcast of the announcements.

IV.

It is further ordered, That respondent George Tannous shall maintain for at least three (3) years and, upon request, make available to the Federal Trade Commission for inspection and copying:

A. All records and documents necessary to demonstrate fully his compliance with Part III of this order, including but not limited to:

1. Copies of all contracts entered into for the production and broadcast of the announcements;
2. Copies and records of all communications concerning the text of the announcements and the dates and times that the announcements are to be broadcast; and
3. Evidence of payment for the production and broadcast of the announcements.

B. All records and documents relating to any credit improvement service or credit card procurement service that he offers to any person, including but not limited to:

1. Copies of any advertising and promotional material disseminated to any person;
2. Copies of any contracts, disclosure statements or other documents furnished to any person;
3. Copies of any material offering, directly or by implication, any money-back or satisfaction guarantee in connection with the purchase of such services;
4. Copies of any request for a refund from any person, any correspondence or other records relating to such request, and documentation sufficient to show the date, manner, amount, and recipient of any refund made; and
5. Copies of documents and records sufficient to show that, in the ordinary course of business, respondent performs the services that he represents, directly or by implication, that he can or will perform.

V.

It is further ordered, That respondent George Tannous and his successors and assigns distribute a copy of this order to any present or future officers, agents, representatives and employees having advertising, sales, or managerial responsibilities with respect to the subject matter of this order and that respondent and his successors and assigns secure from each such person a signed statement acknowledging receipt of said order.

VI.

It is further ordered, That respondent George Tannous promptly notify the Federal Trade Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment whose activities include credit improvement services or credit card procurement services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VII.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order, and that respondent shall file such supplemental reports as the Commission subsequently requests.

Commissioner Strenio did not participate.

IN THE MATTER OF

NATIONAL DECORATING PRODUCTS ASSOCIATION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9192. Complaint, April 29, 1985—Decision, June 11, 1986

This consent order requires, among other things, a St. Louis, Mo. wallcovering industry trade association and its New England regional affiliate based in Westport, Conn., to cease any conduct having the effect of fixing prices, terms or conditions of sale of wallcoverings. Further, respondents are prohibited from: (1) coercing any seller or supplier of wallcovering to use or not use any prices, terms or conditions of sale, distribution methods or policy of choosing customers, and (2) assisting any affiliate or member who use any of the prohibited practices.

Appearances

For the Commission: *Kevin T. Cronin.*

For the respondent: *George D. Webster, Webster, Chamberlain & Bean,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the above caption have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

A. *Wallcoverings* means flexible materials used to cover residential and commercial walls, such as simple wallpapers, vinyls, fabrics, and foils.

B. *Supplier* means a manufacturer or a distributor of wallcoverings or an entity engaged in the sale of wallcoverings for resale by others to consumers.

PAR. 2. Respondent National Decorating Products Association, Inc. ("NDPA") is a New Jersey corporation with its principal place of business at 1050 North Lindbergh Boulevard, St. Louis, Missouri.

NDPA is composed of full voting members, which are retail businesses engaged in the promotion and sale of wallcoverings, and nonvoting associate members, which are suppliers of wallcoverings. NDPA's membership consists of approximately 4000 firms, over 99 percent of which are independent decorating products retailers operating some 7000 retail stores, or about one-third of all the stores that sell wallcoverings, and constituting about 75 percent of the independent decorating products retailers in the United States.

PAR. 3. NDPA was organized, *inter alia,* to facilitate the exchange of information among its members concerning methods for conducting business in the sale and distribution of wallcoverings, and to encourage the formation of regional and local affiliates composed of retail sellers of wallcoverings. There are about 24 local affiliates and three regional affiliates of NDPA. Approximately one-third of NDPA members are members of a local affiliate. NDPA's policies are determined, and its affairs are directed, by an 18 member board of directors, which includes a minimum of one member from each of nine geographic zones.

PAR. 4. Respondent Eastern Decorating Products Association ("EDPA") is an unincorporated association with its principal place of business at 10 Bay Street, Suite 134, Westport, Connecticut. EDPA is a regional affiliate of NDPA and is composed of members from nine local affiliates of NDPA in the New England and Middle Atlantic states.

PAR. 5. Respondent Decorating Products Dealers Association of Greater New York, Inc. ("DPDA-NY") is a New York corporation with its principal place of business at Bell Plaza, 42–40 Bell Boulevard, Bayside, New York. DPDA-NY is a local affiliate of NDPA.

PAR. 6. Full voting members of respondents are engaged in the operation of retail decorating products stores where wallcoverings are sold. Annual retail sales of wallcoverings in the United States are approximately $1.5 billion. Except to the extent that competition has been restrained as herein alleged, full voting members of respondents have been and are now in competition among themselves and with other sellers of wallcoverings.

PAR. 7. Respondents engage in substantial activities which further the pecuniary interests of their members. By virtue of their purposes and their activities, respondents are corporations within the meaning of Section 4 of the Federal Trade Commission Act, *as amended,* 15 U.S.C. 44.

PAR. 8. Respondents, and their members, engage in acts and practices, including the acts and practices described below, which are in or affect commerce within the meaning of the Federal Trade Commission Act, *as amended.*

COUNT I

PAR. 9. Members of respondents NDPA, EDPA, and DPDA-NY are wallcovering retailers. To permit consumers to select from a wide variety of wallcoverings, retailers display in their showrooms sample books most of which contain manufacturers' suggested retail prices and product identification numbers. Some wallcovering retailers, including mail order houses, offer percentage discounts from manufacturers' suggested retail prices. Consumers use suggested resale prices both to comparison shop between retailers offering percentage discounts and as one indication of quality differences between various wallcovering samples.

PAR. 10. Respondents NDPA, EDPA, DPDA-NY, and others, have combined or conspired between and among themselves, and with at least some of their members, to restrain price competition in the sale of wallcoverings, to fix or stabilize prices, and to prevent discounting from manufacturers' suggested retail prices by suppressing, or attempting to suppress, information concerning manufacturers' suggested retail prices.

PAR. 11. Respondents NDPA, EDPA and DPDA-NY, and at least some of their members, have engaged in various acts or practices in furtherance of this combination or conspiracy, including, one or more of the following:

A. Removing or otherwise concealing, or urging members to remove or otherwise to conceal the suggested prices in wallcovering sample books;

B. Attempting to pressure, and urging members to pressure, suppliers into publishing wallcovering sample books without suggested prices by, among other things, agreeing to give favored treatment to products of suppliers that do not include suggested retail prices in wallcovering sample books;

C. Offering to provide assistance to members to determine what retail prices to charge in the absence of manufacturers' suggested retail prices.

PAR. 12. The combination or conspiracy and the acts and practices alleged in Paragraphs Ten and Eleven have had, or have the tendency or capacity to have, the following effects, among others:

A. Fixing, maintaining, or stabilizing prices of wallcoverings;

B. Restraining competition in connection with the sale and distribution of wallcoverings;

C. Depriving consumers of the benefits of additional price, quality, and service competition in connection with the purchase and sale of wallcoverings.

PAR. 13. The combination or conspiracy and the acts and practices alleged in Paragraphs Ten and Eleven constitute unfair methods of competition or unfair or deceptive acts and practices by respondent in violation of Section 5 of the Federal Trade Commission Act, *as amended.*

COUNT II

PAR. 14. Wallcoverings are packaged in double rolls, although some manufacturers price and sell wallcoverings in single rolls. Some suppliers impose a cutting charge when processing orders for single rolls.

PAR. 15. Respondents NDPA and DPDA-NY, and others have combined or conspired between and among themselves, and with at least some of their members, to restrain competition by attempting to fix or restrain the prices paid to wallcovering suppliers by retailers.

PAR. 16. Respondents NDPA, DPDA-NY, and at least some of their members and others have engaged in various acts or practices in furtherance of these combinations or conspiracies, including, one or more of the following:

A. Threatening, and urging members to threaten, to refuse to deal with suppliers that imposed cutting charges;

B. Refusing to pay, or urging members to refuse to pay, cutting charges imposed by suppliers;

C. Publishing and circulating to suppliers, and others, letters stating or implying that members would refuse to deal with suppliers imposing cutting charges, or urging members to refuse to pay cutting charges imposed by suppliers.

PAR. 17. The combination or conspiracy and the acts and practices alleged in Paragraphs Fifteen and Sixteen have had, or have the tendency or capacity to have, the following effects, among others:

A. Fixing, maintaining, or stabilizing prices of wallcoverings;

B. Restraining competition in connection with the sale and distribution of wallcoverings;

C. Depriving consumers of the benefits of additional price, quality, and service competition in connection with the purchase and sale of wallcoverings.

PAR. 18. The combination or conspiracy and the acts and practices alleged in Paragraphs Fifteen and Sixteen constitute unfair methods of competition or unfair or deceptive acts and practices by respondents in violation of Section 5 of the Federal Trade Commission Act, *as amended.* These combinations or conspiracies, as well as those alleged in Count I, are continuing and will continue in the absence of appropriate relief.

Decision and Order

as to
National Decorating Products Association, Inc. and Eastern Decorating Products Association

The Commission having heretofore issued its complaint charging respondents National Decorating Products Association, Inc. ("NDPA"), a corporation, and Eastern Decorating Products Association ("EDPA"), an unincorporated association, named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter as to these respondents from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent NDPA is a corporation organized, existing and doing business under and by virtue of the laws of the state of New Jersey, with its office and principal place of business located at 1050 North Lindbergh Boulevard, St. Louis, Missouri.

2. Respondent EDPA is an unincorporated association with its office and principal place of business located at 10 Bay Street, Suite 134, Westport, Connecticut.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *NDPA* means the National Decorating Products Association, Inc., its officers, directors, committees, representatives, agents, employees, successors and assigns.

B. *EDPA* means the Eastern Decorating Products Association, its officers, directors, committees, representatives, agents, employees, successors and assigns.

C. *Wallcoverings* means flexible materials used to cover residential and commercial walls, such as simple wallpapers, vinyls, fabrics and foils.

II.

It is further ordered, That NDPA and EDPA, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, shall cease and desist from:

A. Conduct having the purpose or effect of:

1. fixing, maintaining, or stabilizing prices, terms or conditions of sale of wallcoverings;

2. coercing any seller of wallcoverings to adopt, abandon, or refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

B. Expressly or impliedly advocating, suggesting, advising, or recommending that any of NDPA's or EDPA's members refuse to deal with any seller of wallcoverings on account of, or that any of NDPA's or EDPA's members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

C. Publishing or circulating the results of any survey of, or otherwise identifying, prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings in order to coerce, compel or induce any seller of wallcoverings to adopt or abandon or to refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

D. Aiding or assisting any affiliates of NDPA or NDPA members in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That this order shall not be construed to prevent NDPA or EDPA from publishing written materials or sponsoring seminars, or otherwise providing information or its members' views on topics including but not limited to cost accounting principles, and suggested prices and product identification numbers in wallcovering sample books to other sellers of wallcoverings, *provided, however,* that the information or views are not presented in a manner constituting a violation of any provision contained in Part II of this order.

IV.

It is further ordered, That NDPA shall:

A. Within 30 days following service of this order, mail a copy of this order to each of its members.

B. Within 60 days following service of this order, publish this order in an issue of *Decorating Retailer* in the same type size normally used for articles in *Decorating Retailer.*

C. For a period of three years provide each new NDPA member with a copy of this order at the time the new member is accepted into membership.

D. Terminate for a period of one year its affiliation with any affiliate organization within 60 days after learning or having reason to believe that said affiliate organization has engaged, after the date this order becomes final, in any act or practice that, if engaged in by NDPA, would be prohibited by Part II of this order.

V.

It is further ordered, That NDPA and EDPA shall:

A. Within 60 days following service of this order, file a written report with the Commission, setting forth in detail the manner and form in which they have complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to NDPA and EDPA, require.

B. For a period of 3 years following service of this order, maintain in their files copies of all correspondence received from, or sent to, sellers of wallcoverings, associations of sellers of wallcoverings, or

NDPA affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request. However, NDPA and EDPA need not maintain copies of press releases received from sellers of wallcoverings.

C. Notify the Commission at least 30 days prior to any proposed change in NDPA's or EDPA's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance obligations arising out of this order.

Chairman Oliver did not participate.

IN THE MATTER OF

DECORATING PRODUCTS DEALERS ASSOCIATION OF GREATER NEW YORK, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9192. Complaint, April 29, 1985—Decision, June 11, 1986*

This consent order requires, among other things, a Bayside, N.Y. local affiliate of a wallcovering industry trade association to cease any conduct having the effect of fixing prices, terms or conditions of sale of wallcoverings. Further, respondent is prohibited from: (1) coercing any seller or supplier of wallcovering to use or not use any prices, terms or conditions of sale, distribution methods or policy of choosing customers, and (2) assisting any affiliate or member who use any of the prohibited practices.

Appearances

For the Commission: *Kevin T. Cronin.*

For the respondent: *James H. Sneed,* Washington, D.C.

DECISION AND ORDER

AS TO
DECORATING PRODUCTS DEALERS ASSOCIATION OF GREATER NEW YORK, INC.

The Commission having heretofore issued its complaint charging respondent Decorating Products Dealers Association of Greater New York, Inc. ("DPDA-NY"), a corporation, named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

* Complaint previously published at 107 F.T.C. 498 (1986).

The Secretary of the Commission having thereafter withdrawn this matter as to this respondent from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent DPDA-NY is a corporation organized, existing and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 42–40 Bell Boulevard, Bayside, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

A. *DPDA-NY* means the Decorating Products Dealers Association of Greater New York, Inc., its officers, directors, committees, representatives, agents, employees, successors and assigns.

B. *Wallcoverings* means flexible materials used to cover residential and commercial walls, such as simple wallpapers, vinyls, fabrics and foils.

II.

It is further ordered, That DPDA-NY, individually or in concert with any other person, directly or indirectly, or through any corporate or other device, shall cease and desist from:

A. Conduct having the purpose or effect of:

1. fixing, maintaining, or stabilizing prices, terms or conditions of sale of wallcoverings;

2. coercing any seller of wallcoverings to adopt, abandon, or refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

B. Expressly or impliedly advocating, suggesting, advising, or recommending that any of DPDA-NY's members refuse to deal with any seller of wallcoverings on account of, or that any of DPDA-NY's members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

C. Publishing or circulating the results of any survey of, or otherwise identifying, prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings in order to coerce, compel or induce any seller of wallcoverings to adopt or abandon or to refrain from adopting or abandoning any practice or policy concerning prices, terms or conditions of sale, or distribution methods or choice of customers.

D. Aiding or assisting any affiliates of the National Decorating Products Association or NDPA members in engaging in any of the acts prohibited by this Part II.

III.

It is further ordered, That this order shall not be construed to prevent DPDA-NY from providing information or its members' views to other sellers of wallcoverings, *provided, however,* that the information or views are not presented in a manner constituting an actual or threatened refusal to deal.

IV.

It is further ordered, That DPDA-NY shall:

A. Within 30 days following service of this order, mail a copy of this order to each of its members.

B. Within 60 days following service of this order, publish this order in an issue of *Decorating Logic* in the same type size normally used for articles in *Decorating Logic.*

C. For a period of three years provide each new DPDA-NY member with a copy of this order at the time the new member is accepted into membership.

D. Terminate for a period of one year the membership of any DPDA-NY member within 60 days after learning or having reason to believe that said member has engaged, after the date this order becomes final, in any act or practice that, if engaged in by DPDA-NY, would be prohibited by Part II of this order.

V.

It is further ordered, That DPDA-NY shall:

A. Within 60 days following service of this order, file a written report with the Commission, setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission may, by written notice to DPDA-NY, require.

B. For a period of 3 years following service of this order, maintain in its files copies of all correspondence received from, or sent to, sellers of wallcoverings, associations of sellers of wallcoverings, or NDPA affiliates or members, and make such copies available for inspection by representatives of the Federal Trade Commission upon written request.

C. Notify the Commission at least 30 days prior to any proposed change in DPDA-NY's organization or operations, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance obligations arising out of this order.

Chairman Oliver did not participate.

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9171. Complaint, Dec. 16, 1983—Final Order, June 23, 1986

This final order prohibits, among other things, a Washington, D.C. lawyers association from: (1) refusing to provide legal services in connection with any effort to fix or raise fees; (2) interfering with the operation of the D.C. Superior Court, any other court, or any government agency in connection with any effort to fix prices; (3) coercing any person not to provide legal services in an effort to fix prices; and (4) encouraging the association, any member, or any other person from engaging in any action prohibited by the order.

Appearances

For the Commission: *Karen G. Bokat, Jonathan J. Groner, Mary Anne M. Fox* and *M. Suzanne Miller.*

For the respondents: *Willis B. Snell, Michael L. Denger* and *Williard K. Tom, Sutherland, Asbill & Brennan,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents Superior Court Trial Lawyers Association, Ralph Perrotta, Karen Dixkoskoff, Reginald Addison and Joanne Slaight have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows: [2]

1. Respondent Superior Court Trial Lawyers Association ("SCTLA") is an unincorporated association organized, existing and doing business in the District of Columbia. SCTLA's mailing address is 500 Indiana Avenue, N.W., Room 1220, Washington, D.C.

2. Respondent SCTLA's members are attorneys who in general own or operate private law practices in the District of Columbia for a profit. Respondent SCTLA's members generally specialize in the representation of criminal defendants for a fee. When respondent SCTLA's members represent indigent criminal defendants in the Su-

perior Court of the District of Columbia, their fees are paid by the District of Columbia under the Criminal Justice Act ("CJA") program.

3. Respondents Ralph J. Perrotta, Karen E. Dixkoskoff, Reginald Addison, and Joanne D. Slaight (hereinafter sometimes referred to as "the attorney respondents") own or operate private law practices in the District of Columbia for a profit. At all times relevant herein, Ralph J. Perrotta was respondent SCTLA's president, Karen E. Dixkoskoff was its vice-president, Reginald Addison was its secretary, and Joanne D. Slaight was the chair person of its "Strike Committee."

4. Respondent SCTLA is now, and at all times relevant herein has been, an association organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. Respondents Ralph J. Perrotta, Karen E. Dixkoskoff, Reginald Addison, and [3] Joanne D. Slaight at all times relevant herein have owned or operated private law practices in or affecting commerce in the District of Columbia, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. Except to the extent that competition has been restrained as herein alleged, members of respondent SCTLA and the attorney respondents have been and are now in competition among themselves and with other attorneys in deciding independently whether and to what extent they will seek CJA program cases at fees offered by the District of Columbia, as opposed to other legal work, and in obtaining appointments to represent indigent criminal defendants in the Superior Court of the District of Columbia.

6. In August 1983, members of respondent SCTLA and the attorney respondents entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program. Virtually all of the attorneys who regularly compete for or accept new appointments under the CJA program joined in this agreement to restrain trade. A substantial number of these attorneys signed a petition stating: "We the undersigned private criminal lawyers in D.C. Superior Court agree that unless we are granted a substantial increase in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act." [4]

7. In furtherance of their agreement, beginning on September 6, 1983, members of respondent SCTLA, the attorney respondents, and other attorneys took the following actions, among others: (1) they

refused to compete or make themselves available for appointments to represent indigent defendants in Superior Court; and (2) they attempted to use harassment or other means to induce other attorneys to refrain from seeking or accepting appointments to represent indigent defendants in Superior Court.

8. In engaging in the acts and practices described in Paragraphs 6 and 7, respondent SCTLA has acted as a combination of at least some of its members, or in conspiracy with some of them or others, to increase the fees offered by the District of Columbia under the CJA program and to boycott the CJA program administered by the District of Columbia.

9. Respondents' acts and practices, described above, have had the following effects, among others:

a. Competition for CJA appointments among respondent SCTLA's members, and between respondent SCTLA's members and other attorneys, has been restrained;

b. The administration of criminal justice in the District of Columbia has been disrupted, imposing increased costs on the Superior Court; and

c. The District of Columbia's decision with respect to the fee levels to offer attorneys under the CJA program was made under the duress occasioned by the disruption of its criminal justice system, and that decision was to offer increased fees, resulting in substantially higher costs. [5]

10. Respondents' acts and practices, described above, constitute a conspiracy to fix prices and to conduct a boycott, and they are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violations, or the effects thereof, are continuing and will continue in the absence of the relief requested.

DISSENTING STATEMENT BY COMMISSIONER MICHAEL PERTSCHUK*

I have voted against issuing a complaint in this matter because it represents a poor exercise of prosecutorial discretion. I do not doubt there is reason to believe a legal violation has occurred. However, as the Chairman is fond of pointing out, we are responsible for allocating our scarce resources so as to focus on cases which "harm consumers." The Commission under this administration has failed to bring any cases involving predatory pricing, the Robinson-Patman Act, resale price maintenance, vertical mergers, or conglomerate mergers. Now, it issues a complaint against an effort by a group of local lawyers, paid

* Michael Pertschuk, Commissioner 1977–1984.

by the District of Columbia to serve indigent clients, to raise reimbursement rates in a situation where it is generally agreed the rates were too low to insure adequate representation.

In addition to the local and limited nature of the lawyer's effort, and the fact that, from a practical perspective, they were underpaid, other factors mitigate against formal enforcement action. The theoretical "victim," the District of Columbia, never asked for our intervention nor asserted its own antitrust prohibitions. The dispute between the lawyers and the District is now over, legal services are again being provided. The system is working better than before. Finally, should liability be found and an order ultimately issued, there will be inevitable problems in enforcing it given that the "respondent" here is a loose-knit collection of individuals.

All this is not to say that conspiracies by lawyers or other professionals to raise fees are not antitrust violations, or that I would not enthusiastically support a case challenging such a conspiracy in a different set of circumstances in the future. In *this* case at *this* time, we should spend our time on more harmful conduct.

December 16, 1983

Initial Decision by

Morton Needelman, Administrative Law Judge

October 18, 1984

I.

Statement of the Case

Most of the criminal defendants brought before the District of Columbia's Superior Court[1] are indigents represented by private lawyers appointed by the commissioners and judges of the Superior Court under the District's Criminal Justice Act ("CJA"). The fees paid to these "CJA lawyers"[2] had been set in 1970 at $20 for out-of-court time

[1] Since 1970, Superior Court has been the principal trial forum for criminal offenses involving violations of the D.C. Code. Criminal cases in Superior Court are heard in two divisions—Criminal Division for adults, Family Division for juveniles under age 18. The United States District Court for the District of Columbia has concurrent jurisdiction with Superior Court for any violation of the D.C. Code which is also a federal offense. In actual practice, fully 95 percent of all criminal cases brought in the District are heard in Superior Court. *See* Carter 124–126, 220, 221.

[2] The CJA lawyers are sometimes referred to as "Fifth Streeters" (for where Judiciary Square, Superior Court, and the offices of some CJA old-timers are located) as a way of distinguishing them from Washington's "uptown lawyers" who practice in the federal court system, before federal departments and administrative agencies, and on the civil side of Superior Court. While the offices of the uptown bar are usually located on the streets leading off Connecticut Avenue, the geographical separation between the two bars is gradually diminishing as a result of the gentrification of the area between 15th and 5th Streets. Notwithstanding the blurring of territorial lines, the separation of Washington lawyers between Fifth Streeters and the uptown bar is well-recognized and embraces

(footnote cont'd)

and $30 for in-court time. This case centers around a 1983 boycott organized by the Superior [2] Court Trial Lawyers Association ("SCTLA"), a confederation of CJA lawyers, to obtain higher fees.

The Commission's complaint, which was filed on December 16, 1983, charges that the members of SCTLA and three named officers of the association (respondents Perrotta, Koskoff[3] and Addison), as well as respondent Joanne D. Slaight as head of a so-called "Strike Committee", entered into an agreement among themselves and with other CJA lawyers to restrain trade by refusing to compete for or to accept new appointments unless fees were raised. In support of this charge, the complaint cites the following petition attributed to SCTLA:

> We, the undersigned criminal lawyers in the District of Columbia Superior Court, agree that unless we are granted substantial increases in our hourly rate, we will cease accepting new appointments under the Criminal Justice Act.

The subsequent refusal by the members of SCTLA and the named individual respondents to take additional appointments, as well as the alleged harassment aimed at inducing other attorneys to refuse appointments, is variously characterized in the complaint as an illegal agreement, a combination, and a conspiracy to fix prices and to conduct a boycott. According to the complaint, but for the boycott, the CJA lawyers would have competed among themselves in deciding independently whether to accept CJA cases at fees offered by the District. The effects of the boycott are said to include a restraint on competition for CJA appointments, [3] the disruption of the District's criminal justice system, and the imposition by duress of additional costs on the District.

Respondents' answer, dated January 6, 1984, acknowledges that respondents Slaight and Addison signed the aforementioned petition but otherwise denies all material allegations in the complaint. The answer also states that SCTLA is not a legally accountable or even an identifiable organization for purposes of a Federal Trade Commission proceeding. The answer asserts as affirmative defenses that respondents' activity represented the exercise of the right to petition guaranteed by the First Amendment, and was undertaken in furtherance of the Sixth Amendment rights of indigent criminal defendants.

In the prehearing stage both sides were allowed discovery including

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every aspect of their respective practices: kinds of clients, types of cases, prestige, income, amenities, and the forums where they generally appear. The CJA bar must also be distinguished from the handful of District lawyers who represent the big-time criminal defendants—those in control of prostitution, gambling, and drugs and who can well afford to pay generously for skilled counsel. *See* Perrotta 647–649. *See also* JX 2, p. 51, JX 4, p. 21, JX 6, p. 71, JX 11, p. 133; RX's 647–649.

[3] By my order dated August 15, 1984, the pertinent part of the caption of the case was changed to "Karen E. Koskoff" from the original "Karen E. Dixkoskoff" to reflect a legal name change.

depositions of all prospective witnesses and several key participants in the boycott who were not subsequently called as witnesses. Complaint counsel's case-in-chief was heard during the week of May 7, 1984. The defense case was presented between May 13, 1984, and May 25, 1984. Rebuttal exhibits were offered by complaint counsel on June 8, 1984, and the record was closed for the receipt of evidence on July 20, 1984. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on August 14, 1984. Reply briefs were filed on September 4, 1984.

After reviewing all the evidence as well as proposed findings and briefs submitted by the parties, and based on the [4] entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:[4] [7]

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[4] Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX – (Complaint counsel's exhibits)
RX – (Respondents' exhibits)
JX – (Joint exhibits)

Testimony is cited by the name of the witness, followed by transcript page as in Isbell 1357. Complaint counsel's Exhibit 1 and respondents' Exhibit 1 are the indices required by Section 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

Name	Called By	Tr. Pages
Francis D. Carter (Director, Public Defender Service)	Complaint counsel ("c.c.")	67–290
Herbert C. Robinson (Chief of Staff, Criminal Justice Act Office, Public Defender Service)	c.c.	311–384
Lillian A. McEwen (CJA Lawyer)	c.c.	407–517
Hugh O'Neill (CJA Lawyer)	c.c.	525–574
Ralph J. Perrotta (CJA Lawyer, former SCTLA President and now Chairman of SCTLA Board of Directors)	Respondents ("resp.")	634–784
Karen E. Koskoff (CJA Lawyer, former SCTLA Vice-President, and now SCTLA President) [5]	resp.	784–866
Reginald G. Addison (CJA Lawyer, former SCTLA Secretary and now SCTLA Vice-President)	resp.	872–911
Nelson J. Kline (Former CJA Lawyer and Media Representative for the "Strike Committee")	resp.	916–948
Joanne D. Slaight (Former CJA Lawyer and Chairperson of the "Strike Committee")	resp.	949–975
Robert H. Salisbury (Professor of Political Science, Washington University, St. Louis, Missouri)	resp.	979–1047
John H. Pickering (Former President, D.C. Bar (Unified))	resp.	1051–1109

II.

Findings of Fact

A. *SCTLA*

1. Respondent Superior Court Trial Lawyers Association ("SCTLA"), a loosely-organized unincorporated association, served as the rallying point for the 1983 campaign waged by the CJA lawyers to increase their fees. (Findings 2 to 4.)

2. SCTLA has been in existence for at least 10 years.[5] It is located in Room 1220, Superior Court Building, 500 Indiana Avenue, N.W., Washington, D.C.[6] At one point, SCTLA had some of the formal trappings of a professional organization—*i.e.*, a certificate of incorporation as a District of Columbia non-profit corporation, by-laws, and a Blue Cross/Blue Shield insurance policy.[7] The certificate of incorporation was revoked on September 14, 1981; in early 1983 it was decertified for health insurance purposes because it did not meet Blue

Edward P. Colbert (Uptown Lawyer)	resp.	1109–1124
Geoffrey C. Hazard, Jr. (Professor of Law, Yale Law School, and Director, American Law Institute)	resp.	1128–1173
James F. Rill (Uptown Lawyer)	resp.	1177–1190
Edward J. Lopata (Uptown Lawyer)	resp.	1191–1206
Sterling Tucker (Former Chairman, D.C. City Council)	resp.	1236–1283
James R. Loftis, III (Uptown Lawyer)	resp.	1283–1295
David B. Isbell (President, D.C. Bar (Unified)) [6]	resp.	1302–1369
Wiley A. Branton (Former Dean, Howard University Law School)	resp.	1370–1413
Norman Lefstein (Professor of Law, University of North Carolina Law School)	resp.	1418–1540

Deposition testimony appears in the following joint exhibits:

JX's 2–4 – J. Gerard Lewis (CJA lawyer and SCTLA Treasurer)
JX 5 – Cheryl B. Stein (CJA lawyer and member of the "Strike Committee")
JX 6 – David B. Hirsch (CJA lawyer and member of the "Strike Committee")
JX 7 – Robert J. Pleshew (CJA lawyer and former member of SCTLA Board of Directors)
JX 8 – Roger L. Pickens (CJA lawyer and member of the "Strike Committee")
JX 9 – Yvonne T. Foster (CJA lawyer and former SCTLA Secretary)
JX 10 – Joanne D. Slaight (*See* above)
JX 11 – Ralph J. Perrotta (*See* above)
JX 12 – Reginald G. Addison (*See* above)
JX 13 – Karen E. Koskoff (*See* above)

Deposition testimony is cited by reference to the joint exhibits listed above, followed by page number.

[5] JX 11, p. 23; CX 2A.

[6] CX 6A.

[7] JX 2, pp. 21, 24, 25, JX 11, p. 17, JX 13, pp. 20, 21, 124; CX 2B, C.

Cross/Blue Shield criteria for an employer/employee group; and if SCTLA now has by-laws no one seems to know where they are or what they say.[8] [8]

3. Because lawyers are constantly entering and leaving CJA practice, the membership of SCTLA is difficult to pin down. There is no reliable membership list.[9] Technically, membership in the organization and the right to vote in SCTLA elections is open to any lawyer who takes CJA cases and pays the $30 annual dues.[10] But income from CJA practice being what it is, there is a minimum level of compliance with the dues requirement, and SCTLA officers (CJA practitioners themselves who appreciate the financial condition of their colleagues) have never vigorously enforced the dues requirement or strictly limited voting in SCTLA elections to dues-paying members.[11] As a result, any CJA lawyer (broadly identified as someone who takes CJA cases) can participate in SCTLA meetings, vote in SCTLA elections, and even hold office in the organization.[12]

4. Despite its diminished status as a formal association, SCTLA nevertheless functions as a viable entity around which the CJA lawyers are organized. SCTLA holds informal meetings from [9] time to time in the Lawyers' Lounge of the courthouse.[13] It has a board of directors and it elects officers.[14] It maintains a bank account.[15] At one time, it organized a Political Action Committee (PAC), which collected funds and made contributions to political candidates supportive of SCTLA's demand for a rate increase.[16] SCTLA officers initiated, and the SCTLA treasury paid, the expenses associated with a pre-boycott lobbying campaign aimed at increasing CJA rates.[17] SCTLA officers orchestrated the boycott and SCTLA paid boycott-related expenses.[18] In general, SCTLA holds itself out as the representative of CJA lawyers, and in that capacity its leaders are perceived as authorized to speak for CJA lawyers on the question of rates and other matters affecting CJA practice.[19] [10]

[8] JX 2, p. 23, JX 3, p. 212, JX 6, p. 65, JX 11, p. 17; CX 2D.

[9] JX 2, pp. 14–17, JX 9, pp. 16, 17; CX 1634A-I, which purports to be an SCTLA membership application list, contains the names of individuals who are not in CJA practice. JX 7, p. 52, JX 9, p. 54.

[10] JX 2, p. 20, JX 7, pp. 14, 47, 50, JX 9, p. 17, JX 13, pp. 176, 190.

[11] JX 2, pp. 15, 16, JX 3, p. 208, JX 6, pp. 8, 9, JX 9, pp. 11, 12, 17, JX 11, p. 21.

[12] JX 2, p. 8, JX 5, p. 19, JX 6, pp. 8, 11, JX 7, pp. 7–13, JX 12, pp. 28, 46–48; Addison 892.

[13] Meetings (including election meetings) are held on the spur-of-the-moment or whenever someone posts a notice on the blackboard in the Lawyers' Lounge of Superior Court announcing that one is necessary. JX 2 p. 58, JX 6, pp. 55, 56, JX 7, p. 9, JX 13, p. 37.

[14] JX 2, p. 8, JX 3, pp. 138, 139, JX 7, pp. 12–14, 17, JX 9, pp. 8, 10, 11, 13, 43–45, JX 11, p. 20, JX 12, p. 22, JX 13, p. 21.

[15] JX 2, pp. 8, 19, 59, 60, JX 3, p. 200; CX 56.

[16] JX 10, p. 14, JX 11, pp. 23, 24; Perrotta 679.

[17] JX 2, pp. 25–27, JX 11, pp. 97, 98; Perrotta 679, 693, 694, 698, 699.

[18] *See* Findings 46–49, 55, 58, 63, 65, 66.

[19] JX 2, pp. 46–53, JX 7, pp. 16, 20, JX 11, pp. 60, 98, JX 12, pp. 21, 24, 26; CX's 6A–14, 36C, 38F, 84A; RX's 63B, 142B-D; Perrotta 678–680, Koskoff 849, 850, Pickering 1090, 1091. *See also* Findings 37–40, 42–45, 50, 55, 58, 63, 65, 66.

B. *Individual Respondents*

5. Respondent Ralph J. Perrotta graduated from the Harvard Law School in 1960, and was admitted to practice in the District of Columbia the same year. Between 1960 and 1979, Perrotta pursued a varied career with emphasis on public interest work: he drafted Medicaid and child abuse legislation; he established antipoverty, head start, legal services, and neighborhood health programs; and he worked with organizations concerned with the problems of urban ethnic groups. Perrotta also taught courses on urban affairs at the Rhode Island School of Design and Cornell University. In 1976, he ran unsuccessfully for the Democratic nomination for United States Senator from Rhode Island. Perrotta entered CJA practice in 1979 when he found that public interest funding was drying up and that career opportunities in this area were no longer readily available.[20] At present, about 90 percent of Perrotta's practice consists of CJA cases.[21] He conducts his practice from his home and he has no employees.[22] In the fall of 1982, Perrotta was elected President of SCTLA and in October, 1983, he was elected Chairman of the Board of SCTLA.[23]

6. Respondent Karen E. Koskoff graduated from Antioch Law School in 1979 and was admitted to practice in the District of [11] Columbia in 1980. She is a sole practitioner who has accepted CJA cases since early 1981. Her interest in criminal and poverty law traces back to her high school days when she served as a part-time staff member in a drug treatment program. In college she assisted released prisoners in finding jobs. Koskoff has worked as an investigator for the public defender service in Montpelier, Vermont, and as a social worker in a work release program for prisoners in Madison County, Alabama. While attending Antioch Law School, she participated in the school's Prisoners' Rights Clinic, Adult Misdemeanor Clinic, and Juvenile Clinic. In her third year at Antioch, Koskoff was certified to handle misdemeanor cases in Superior Court in the District. After graduation from law school, she was employed as a staff attorney with the Public Defender Service in Pittsburgh, Pennsylvania and worked briefly with a Washington, D.C. law firm. Koskoff began taking CJA assignments in 1981.[24] At present, approximately 99 percent of her practice consists of CJA cases.[25] She conducts her practice from her

[20] Perrotta 635–641.
[21] Perrotta 647.
[22] JX 11, p. 9; Perrotta 646, 647.
[23] JX 11, p. 19; Perrotta 663, 762, 763.
[24] Koskoff 785–792.
[25] JX 13, p. 47; Koskoff 792, 793.

home and has no employees.[26] In late 1982, Koskoff was elected Vice-President of SCTLA and in October, 1983, she was elected President of SCTLA.[27] [12]

7. Respondent Reginald G. Addison graduated from George Washington University Law School in 1981 and was admitted to practice in the District of Columbia the same year. He grew up in Southeast Washington, "had a couple of brushes with the law"[28] as a juvenile, and went into CJA practice determined to help those from a similar background.[29] He is a sole practitioner who has accepted CJA cases since February, 1982. Approximately 90 percent of Addison's current practice consists of CJA cases. He maintains an answering service in a part-time office that also serves as his mailing address. He has no employees.[30] In the summer of 1983, Addison was elected Secretary of SCTLA and in October, 1983, he was elected Vice-President of SCTLA.[31]

8. Respondent Joanne D. Slaight graduated from Catholic University Law School in 1980 and was admitted to practice in the District of Columbia the same year. Before entering law school, she was employed in public interest work in California and New York.[32] She began taking CJA assignments in 1981, and at the time of the boycott, approximately 95 percent of Slaight's practice consisted of CJA cases. Until December, 1983, she maintained an office in the District of Columbia. She had no [13] employees.[33] She has never been elected as an officer or director of SCTLA and did not pay dues to SCTLA in 1983.[34] In August, 1983, Slaight was designated as Chairperson of a "Strike Committee", which later evolved into the "SCTLA Strike Committee."[35] In December, 1983, she stopped handling CJA cases in the District of Columbia and now lives in Staten Island, New York. Slaight is presently employed by The New York Public Interest Research Group, Inc.[36]

C. *The Criminal Indigency Problem In The District Of Columbia*

9. The Sixth Amendment of the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

[26] Koskoff 793.
[27] JX 13, p. 19; Koskoff 785, 793, 794.
[28] Addison 874.
[29] Addison 873–875.
[30] JX 12, pp. 7, 9, 10; Addison 873–875.
[31] JX 9, p. 13, JX 12, p. 20.
[32] Slaight 950.
[33] JX 10, p. 7; Slaight 951, 952, 954.
[34] JX 10, p. 12; Slaight 973.
[35] JX 10, pp. 32, 33; Slaight 973. *See also* Findings 47, 58.
[36] Slaight 950.

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10. The Supreme Court has held that the Sixth Amendment right of the accused to be represented by counsel is essential because lawyers are the means through which all other rights are [14] secured.[37] In *Powell v. Alabama,* the Court said that the right of fair trial itself would be meaningless without counsel.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[38]

11. The Court has also held that the Sixth Amendment guarantees more than just the right to retain a lawyer or to have one appointed. By its terms, the accused has a right to "the Assistance of Counsel for his defense," and "Assistance" in the context of our adversary system means that the criminal defendant should have by his side a vigorous and effective advocate who at [15] every turn requires "the prosecution's case to survive the crucible of meaningful adversial testing."[39]

12. The constitutional guarantee of effective counsel applies to all criminal defendants, rich and poor alike. In *Gideon v. Wainwright,* the Court said:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[40]

13. Following *Gideon,* the right of the indigent accused to counsel

[37] *United States v. Cronic,* 52 U.S.L.W. 4560 (May 14, 1984); *Argersinger v. Hamlin,* 407 U.S. 25 (1972); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Powell v. Alabama,* 287 U.S. 45 (1932).

[38] 287 U.S. 45 at 68–69 (1932).

[39] *United States v. Cronic,* 52 U.S.L.W. 4560 at 4562 (May 14, 1984). *See also Strickland v. Washington,* 52 U.S.L.W. 4565 (May 14, 1984).

[40] 372 U.S. 335 at 344 (1963).

has been extended to misdemeanor cases in which the accused may suffer a loss of liberty, and to the crucial preliminary proceedings in a criminal proceeding that can determine the outcome of the trial.[41]

14. Notwithstanding the "noble ideal" of the Sixth Amendment celebrated in cases both before and after *Gideon*, the real world differences between the quality of "Assistance" **[16]** available to the affluent as compared to the needy[42] persists for several reasons. To begin with, there is the sheer dimensions of the criminal indigency problem facing an urban jurisdiction like the District. About 85 percent of the persons charged with criminal offenses in the District are eligible for court-appointed counsel.[43] This translates into approximately 25,000 indigency cases closed in 1982 by court-appointed counsel,[44] and the addition of new "papered"[45] indigency cases at the rate of 50 to 80 a day.[46] Further compounding the District's problem is a line of legal authority creating a substantive right to quality representation for the indigent accused at the very time when criminal law itself has been imbued with a host of complex procedural problems requiring an increasingly high level of legal skill.[47] **[17]**

D. *The District's Answer To The Criminal Indigency Problem*

15. The District's answer to its criminal indigency problem is a mixed system consisting of both private lawyers compensated under the Criminal Justice Act (CJA lawyers) and government lawyers employed by the District's Public Defender Service (PDS). (Findings 16 to 19.)

16. At the center of the District's mixed system is the Public Defender Service (PDS), which not only constitutes one of the two operating arms of the mixed system, but also contains within its table of organization the Criminal Justice Act Office (CJA Office of PDS), the administrative office with responsibility for the other component of the mixed system—the private practitioners (CJA lawyers) compensated under the District's Criminal Justice Act (D.C. CJA).[48]

17. The PDS component of the mixed system was established by

[41] *United States v. Gouveia*, 52 U.S.L.W. 4659 (May 29, 1984); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

[42] *See, e.g., Strickland v. Washington*, 52 U.S.L.W. 4565 at 4576 (dissenting opinion of Mr. Justice Marshall) (May 14, 1984) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure that he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case".).

[43] Carter 88, 126, 127, Robinson 326.

[44] RX 14S; Carter 154.

[45] A "papered" case is one in which formal charges are filed by the United States Attorney who prosecutes all criminal offenses in the District. If a case is "no papered" (*i.e.*, no charge is filed) the accused is released. The decision to "no paper" a case is usually, but not always, made early in the day before court-appointed counsel has been assigned. Carter 76, 128.

[46] CX 233E; RX 158E.

[47] Hazard 1139–1142.

[48] Carter 67–69, Robinson 312–314.

Congress in 1970 as the successor to the Legal Aid Agency. PDS lawyers are full-time employees of the District of Columbia.[49] By statute, PDS may represent only criminal defendants charged with an offense punishable by imprisonment for six months or more, and it may represent no more than 60 percent of the indigents in this overall category.[50] In fiscal 1982, PDS was authorized 110 employees. Of its total complement of 56 [18] attorneys, three supervisors and 38 attorneys are assigned to indigency cases in the Criminal Division of Superior Court.[51]

18. The CJA lawyers component of the mixed system is open to every member in good standing of the D.C. bar having a local address and a local telephone number. To become eligible to receive appointments under the D.C. CJA, all that a private attorney has to do is register with PDS' CJA Office.[52] Although there are more than 1,200 private attorneys on the master list of attorneys registered with the CJA Office, most appointments go to the approximately 100 lawyers[53] (the CJA "regulars") who derive almost all of their income from representing indigents,[54] and make themselves available to take appointments on a regular basis.

19. The two branches of the District's mixed system differ sharply in the role each performs in the criminal justice system. Criminal offenses under the D.C. Code are classified as [19] misdemeanors, felony I's, and felony II's.[55] Most of the cases requiring court-appointed lawyers (20,000 of the 25,000 indigency cases closed in fiscal 1982) are misdemeanors,[56] and clearly it is the CJA lawyers who have assumed the responsibility of moving this large volume of lesser crimes —19,475 misdemeanors in fiscal 1982[57]—through the criminal justice system. About 80 percent of the cases handled by CJA lawyers are misdemeanors. The CJA lawyers also handled some 4,000 felonies in fiscal 1982 but these were mainly felony II's.[58] In all, the CJA lawyers are responsible for fully 85 percent of all the indigency cases.[59] PDS,

[49] Carter 69.

[50] D.C. Code § 1–2702(a)(1); Carter 158.

[51] Carter 138, 139.

[52] Robinson 354.

[53] Estimates of the size of the corps of CJA regulars vary widely in the record (ranging from 50 to 200), and the approximation indicated in the text merely reflects the figure mentioned most often. *See, e.g.*, JX 2, p. 84, JX 3, p. 155, JX 12, p. 112, JX 13, pp. 47, 48; CX's 38G, 76D, 80A; Robinson 323–326, 379.

[54] Because of the nature of CJA practice—its long hours away from the office (assuming the CJA lawyer has an office), the deadlines of Superior Court, and the problem of meeting deadlines in other courts—CJA regulars ordinarily do not take civil cases, nor do they usually appear on the criminal side of U.S. District Court. JX 2, pp. 80–82.

[55] Felony I's are the more serious crimes—homocide, rape, and armed robbery—carrying a maximum sentence of fifteen years. Felony II's are crimes such as burglary and larceny subject to a maximum prison term of fifteen years. Misdemeanors are punishable by imprisonment for no more than one year. Carter 78.

[56] RX 14S; Carter 154, 155.

[57] RX 14S; Carter 153, 154.

[58] RX 14S; Carter 154, 156–158, Perrotta 642, 643.

[59] RX 14S.

in contrast, appears in only about 8 to 10 percent of the criminal indigency cases.[60] This relatively small percentage, however, represents most of the more complex felony I's, including two-thirds of all murder cases.[61] In short, the CJA lawyers handle most of the volume; PDS, on the other hand, operates on the basis of a limited caseload heavily [**20**] skewed toward the more difficult felony I cases.[62] The District is unique among major urban jurisdictions in its reliance on assigned private lawyers to handle such a large percentage of its huge indigency caseload.[63] In 1982, payments made to CJA lawyers by the District amounted to $4,579,572. The PDS appropriation was $3,306,000.[64]

20. In addition to the CJA lawyers and the PDS components of the District's mixed system, indigent criminal defendants are also represented from time to time by private attorneys who take assignments on an uncompensated pro bono basis. Less than one-half of one percent of the eligible indigent defendants are represented by these pro bono attorneys.[65] Third-year law students from Howard, Georgetown, American, Antioch, Catholic, and George Washington University Law Schools who are participating in clinical programs are permitted by Superior Court rules to handle misdemeanor cases under the guidance of a supervising attorney. These uncompensated students handle approximately three to five percent of indigent criminal cases.[66][**21**]

21.The record shows that there are alternatives to the District's mixed system, but no single solution has been a panacea, and the effectiveness of any system is largely a function of the level of public funds made available for indigency representation.[67] Voluntary pro bono, which obviously requires no public funding, may be feasible in a jurisdiction having a relatively small number of indigency cases, but there is no evidence that any voluntary system has operated effectively in the context of the massive criminal indigency problem associated with an urban inner city.[68] Another possible option (also requiring no public funds) is the use of compulsory pro bono—that is, a rule imposed by court, unified bar, or legislature, requiring all lawyers to serve an uncompensated turn as assigned counsel. Such a system has been criticized on several grounds: the lack of experience in criminal law of most of the prospective "draftees"; an unfair shift of what

[60] RX's 5I, 16C; Carter 149, 156. PDS caseloads are far below the statutory limit of 60 percent (*see* Finding 17) of the kinds of cases it is permitted to take. RX 4E; Carter 81.

[61] RX's 4G, 5I; Carter 82.

[62] Carter 81. More than 65 percent of the PDS cases are felonies (Carter 81), and of the PDS felony caseload, 75 to 80 percent are felony I's. RX 14R.

[63] CX 38K; Hazard 1172.

[64] RX's 4Z–8, 22M.

[65] Robinson 327.

[66] RX 11B, C; Carter 80, 81, 136, 137, 267, 268.

[67] Hazard·1165–1170.

[68] *See* Isbell 1357.

should be a matter of societal concern to one group of professionals; the appearance of imbalance in the criminal justice system and the likelihood of inadequate representation that arises when the defense but not the prosecutor is expected to work for nothing; and the strong feeling among members of the bar that a lawyer's duty to perform public service should be left to the individual's discretion and he should be free to exercise that discretion by choosing the [22] kind of pro bono work he favors.[69] As it happens, the District's most recent experience with compulsory pro bono confirms the inherent limitations of the compulsory system. In 1974, when the CJA regulars briefly refused to take additional cases in protest over a fiscal lapse which had dried up all CJA funds, the Chief Judge of the Superior Court directed PDS to draw up a list of all active attorneys so that they might be summoned to serve. Only 43 percent of the attorneys summoned actually reported, thereby demonstrating strenuous bar resistance to the notion of forced contribution of services and a general lack of enthusiasm for criminal practice. As a result of this incident, the Chief Judge has indicated an unwillingness to impose similar [23] drafts.[70] In any event, there are legal impediments to compulsory pro bono, and from a political standpoint, uptown bar opposition in the District would be so strenuous as to make the likelihood of its adoption remote in the extreme.[71]

As for universal PDS—that is, a system in which the public defender represents all indigents—there is little evidence that it would be a practical solution to the District's indigency problem. Technically, no jurisdiction can ever have a universal PDS if for no other reason than the existence of conflicts in multiple-defendant cases that require the appointment of separate counsel. Even more important is the fact that budgetary constraints on effective indigency representation do not disappear under universal PDS. On the contrary, they are compounded since by definition universal PDS means an increased government payroll with concommitant government salaries and gov-

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[69] RX's 2Z–19, Z–20, Z–32, 25Z–5; Hazard 1157, 1158, Isbell 1363–66, Lefstein 1480–1484. *See also* RX's 25Z–4, 26Z–1, 28Q, for the view that compulsory pro bono simply perpetuates the perception that representation of indigents is a form of bargain-basement law and *Ferri v. Ackerman*, 444 U.S. 193, 199 (1979) in which the Supreme Court observed:

> The Criminal Justice Act of 1964 [which first gave D.C. lawyers compensation for representing indigents] was enacted to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials. In response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel, Congress concluded that reasonable compensation would improve the quality of the representation of indigents.

[70] RX 55M-"O"; Carter 216–218, Isbell 1361–1366. *See also* H. Rep. No. 93–1172, 93rd Cong. 2d. Sess. p. 2 (1974). This reluctance exists notwithstanding the favorable impression made by the drafted lawyers in 1974. The judges found that although the draftees initially had difficulty finding their way around the criminal court system, the quality of their representation was high. This was attributed to the draftees sense of professional pride. RX 55Z–4. *See also* RX 2Z–9 for similar experience in the Northern District of Illinois, but note "that only on rare occasions do assigned counsel in the Northern District of Illinois elect, in fact, to contest the guilt of their clients and virtually never pursue a case through the appellate process." *Ibid.*

[71] Carter 218, Pickering 1078, 1098, 1100–1102, Isbell 1362–1365, Lefstein 1483, 1484.

ernment fringe benefits. When a near universal public defender system has been tried in large urban settings, experience has demonstrated that more often than not caseloads [24] have increased faster than the level of funding, thereby creating staff shortages and making quality representation exceedingly difficult.[72]

Still another possible choice is a contract system in which the city asks private attorneys to bid for indigency work. Although the contract system has been tried in a few small jurisdictions, its possible extension to a large metropolitan area has been sharply questioned on the grounds that the quality of legal service may be compromised if a contractual promise to deliver is made at firm prices regardless of caseload or amount of time required for specific cases.[73]

E. *The Operation Of The District's CJA Program*

22. Appointments under the District's mixed system are made Monday through Friday by one of three commissioners and on Saturdays by a Superior Court judge. The process begins when the CJA Office of PDS receives from the U.S. Marshall's Office a "lock-up list" showing the identity of persons arrested and the offenses charged.[74] After interviewing all persons on the lock-up list to determine their eligibility for court-appointed [25] counsel, PDS presents the list (with the designation "CJA" for an indigent) to the commissioner or judge assigned to make the appointments. Typically, about 85 percent of the persons arrested on the lock-up list have the designation "CJA" next to their names.[75] In addition to the lock-up list, the CJA Office furnishes the commissioner or judge with an "attorneys available list". The attorneys available list shows the names of CJA lawyers who have telephoned the CJA Office of PDS between 7:45 a.m. and 8:15 a.m. to establish their availability for that day. The names of CJA lawyers are entered on the attorneys available list in the order of their telephone calls to the CJA Office.[76]

23. Using the lock-up and attorneys available list, the commissioner (or on Saturdays and holidays a Superior Court judge) usually makes appointments to CJA attorneys by using a simple match-up—the first person appearing at the beginning of the lock-up list is matched with

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[72] CX 38L; RX's 25J, 26Z–33; Carter 280, 281, Koskoff 791, Hazard 1166, 1167, Lefstein 1469, 1170. *See also* RX 26Z–14–Z–22 for a description of the San Francisco public defender office where in shoddy, cramped, roach-infested offices, young attorneys lacking training, supervision, and support staff, attempt to practice criminal law.

[73] RX 26Z–42; Lefstein 1467, 1468.

[74] Three lock up lists are received by PDS' CJA Office each day: an early list of persons arrested during the preceding night, a mid-day list of persons arrested that morning, and a late list of persons arrested in the late morning and early afternoon. Carter 74, Robinson 328, 329.

[75] Carter 88, 89, 127, Robinson 326.

[76] Carter 70–72, Robinson 313, 314. Heading the attorney available list are the names of the one or two PDS lawyers who are designated to take indigency assignments for a particular day (*see, e.g.*, CX's 165–216D). The PDS lawyers receive what is perceived to be the more complex cases, usually limited to no more than two or three to each designated PDS lawyer on the available list. Carter 88, 89, 96, 176.

the first attorney appearing on [26] the available list, and so on down the two lists.[77] This rotation, however, may be broken for several reasons. First, at the start of a CJA career, a new attorney, irrespective of position on the available list, will generally receive only misdemeanors.[78] Second, if a particularly complex case comes up, the rotation will be broken as the commissioner or judge searches for a more experienced CJA lawyer on the available list.[79] Third, the rotation may be broken if a CJA attorney had made a request that he or she receive only a particular type of [27] case (*e.g.*, only felonies or only misdemeanors),[80] and some CJA attorneys never receive a serious case whether they want one or not.[81]

24. In general, the most important consideration in making indigency appointments to CJA lawyers is availability.[82] A lawyer must be assigned to every case, and even an inexperienced CJA lawyer may be assigned to a serious felony II if a more seasoned lawyer is not available.[83] Because the District has no shortage of indigent accused, in no time at all (at least in the [28] pre-boycott era) the eager newcomer can obtain a full caseload—many misdemeanors, a few felony II's, and even an occasional felony I.[84] As one veteran CJA lawyer described the operation of the CJA system—

> . . . there was a sense that any lawyer who walked in off the street, if he was a member of the bar, not only qualified to take cases but was entitled to have cases. It was almost a sense that the CJA program was not only a program of representation for indigents

[77] JX 5, p. 55, JX 10, pp. 76, 77; Robinson 350–352. Because of the sharp rise in the number of lawyers calling in after the post-boycott fee increase, an alphabetical list has been substituted for the one based on order of call-in. Robinson 357, 358.

[78] JX 2, p. 63, JX 5, pp. 54, 55, JX 11, p. 82; Perrotta 642, Slaight 953.

[79] JX 5, pp. 53, 55, JX 10, p. 79, JX 11, p. 109; Carter 78, Robinson 321, 322, 350–352, McEwen 436, 438–440, Slaight 953. The complexity of a case is not always apparent to the assignment commissioner since all that he has before him is a charge sheet that makes no distinction between a felony charge, which will plead out quickly, and a misdemeanor having serious implications. JX 13, pp. 44, 45; CX 80C; Addison 905, 906. Moreover, the perception of CJA lawyers is that departures from the usual rotation in the interest of a special appointment to a complex case may be even more haphazard than the rotation itself. Several CJA lawyers testified that an important factor in non-rotational appointments is the personal relationship between a CJA lawyer and the CJA Office. These personal relationships are significant because appointment commissioners often ask the CJA Office to make a recommendation in a complex case. At best, the CJA Office recommendation reflects the limited knowledge that CJA personnel have of actual attorney performance; at worst, recommendations may turn on such bizarre factors as the willingness of a CJA lawyer to turn out for the CJA Office softball team. Furthermore, the very fact that most appointments are made by commissioners rather than judges tends to compound the hit-or-miss nature of the selective appointments. A commissioner, in contrast to a judge, knows little about the actual courtroom capability of CJA lawyers, and with nothing else to go on, an appointment may turn, for example, on how the commissioner reacted to the way a particular CJA lawyer represented a client at a preliminary hearing before the same commissioner. JX 10, pp. 74–77, JX 12, p. 122, JX 13, pp. 41–45; Perrotta 642.

[80] JX 13, p. 44. On rare occasions the available list is not consulted at all as commissioner, judge, or the head of the CJA Office of PDS asks a lawyer to take a case because of past performance in a similar case, prior representation of the same client, or simply because the CJA lawyer happens to be around the courthouse when a special need arises. Carter 80. In addition, for the few cases originating from grand jury indictments ("grand jury originals"), judges appoint highly regarded attorneys by telephoning them directly or by mailing a notice of appointment. JX 10, p. 79; Perrotta 656, 658, 659.

[81] Perrotta 767, 768.

[82] JX 12, p. 120.

[83] JX 11, pp. 107, 108, JX 12, pp. 120–122.

[84] JX 5, pp. 54, 55, JX 10, p. 74, JX 11, pp. 43, 82, 123; Perrotta 642, 643.

but a welfare for broken down or has-been lawyers. When I first went in to talk to Herb Robinson [Chief of the CJA Office] and he put me on the rolls and indicated what I needed to do to pick up cases and I got a bunch of cases within 30 days, I thought that was attributable to my sterling qualities which were no doubt immediately apparent to him. But it turned out that everybody in those days who put his name down and got all the cases they wanted and more because there were just so many cases and so few people.[85]

25. On the basis of this record, no definitive finding can be made about the performance of CJA lawyers in handling their caseloads except to observe that collectively they move a large volume of cases through the District's criminal justice system. *See* Finding 19. As for quality, there is plenty of evidence that within the corps of CJA regulars are dedicated lawyers from public interest backgrounds who consider representation of the [29] poor as the highest calling of the legal profession.[86] Others are drawn by a combination of factors including the attraction of criminal law litigation and a strong desire to be their own bosses (or an equally strong desire to avoid a large corporate practice).[87] There are still others who enter CJA practice as a temporary expedient—a way to pay bills until a civil practice develops.[88] Equally important is the fact that the law schools continue to pour graduates into a job market that is shrinking because of government contraction and deregulation with the result that more than a few young lawyers come to CJA practice because there are no other jobs available.[89] The mixed motivation of CJA lawyers produces a bar of mixed ability. Many CJA lawyers are credited with doing an excellent job in representing their clients, and the consensus seems to be that the overall quality as well as the number of CJA lawyers had improved markedly even before the boycott.[90] But the CJA corps still has its fair share of courthouse "hangers-on" who take as many cases as possible (usually misdemeanors) in the expectation that without investigation, preparation, or concern for the particular needs of their clients, their cases will plead out, [30] and hassles with Bar Council over charges of ineffective representation will be avoided as a living is scratched out collecting CJA fees.[91]

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[85] Perrotta 673, 674. *See also* JX 2, p. 78 for an account of a disbarred lawyer who had accumulated a docket of 300 cases.

[86] JX 3, pp. 205, 206; Branton 1385, 1386.

[87] Klein 945, 946, Slaight 952, 953.

[88] Koskoff 860.

[89] JX 5, p. 97; Carter 113–115, 232, Perrotta 742, Pickering 1081, 1082.

[90] JX 3, pp. 155, 205; RX 74A; Carter 90, 91, 114, 115, Pickering 1082, 1083, 1085, 1086, Branton 1385, 1386, Lefstein 1506.

[91] Perrotta 652, 653, Pickering 1085, 1086. *See also* JX 2, pp. 63, 69, 70, JX 11, p. 107. Bar Council, charged with bringing proceedings against members of the D.C. Bar for ethical or competency lapses, is a constant source of apprehension among CJA lawyers. These fears may be largely chimerical since few CJA lawyers have ever been barred from taking cases because of incompetence. *See* RX 55M.

F. *The CJA Rate Schedule*

26. The origin of pre-boycott CJA fees ($20 for out-of-court time and $30 for in-court time) can be traced back to the 1960's when most criminal cases in the District of Columbia were heard in United States District Court. At that time the local District of Columbia court—the Court of General Sessions—only heard minor misdemeanors. Private attorneys appointed to represent indigents in both United States District Court and the Court of General Sessions were not compensated (except for actual out-of-pocket expenses) under the lofty notion that it was part of their professional responsibility to represent indigents. The concept of uncompensated professional responsibility was largely carried forward into the Criminal Justice Act of 1964 (the federal CJA). This was the first federal statute to provide for compensation but it did so at the niggardly rate of $15 for in-court time and $10 for out-of-court time.[92] The federal CJA Act also provided that compensation could not exceed $500 for felony cases and $300 for misdemeanor cases except in "extraordinary [31] circumstances"—*i.e.*, when a judge determines that payment in excess of the limits "is necessary to provide fair compensation for protracted representation. . . ."[93]

In 1970, the federal CJA was amended by increasing the maximum hourly rate for in-court time from $15 to $30 and the maximum rate for out-of-court time from $10 to $20. The 1970 amendment also increased the maximum compensation per felony case from $500 to $1000 and for a misdemeanor case from $300 to $400. The amendment contained a provision permitting additional compensation of up to $1000 for appellate work and up to $250 for post-trial motions.[94]

By judicial and administrative interpretation (and later by legislative enactment) the federal CJA Act (including the 1970 amendments) was applied to the District's local courts—the Court of General Sessions until 1970 and Superior Court thereafter. But because of the uncertainty respecting the legality of making payments under the federal CJA to an autonomous local court,[95] in 1974 a District of Columbia Criminal Justice Act (the District CJA) was passed authorizing the Joint Committee On Judicial Administration (consisting of three judges from the District's Superior Court and two judges [32] from the District's Court of Appeals) to promulgate an indigency fee schedule, not to exceed the federal CJA level.[96]

What this all boils down to is that in 1983 (just before the SCTLA

[92] RX's 7A-D, 8P-S, 27H, I.

[93] RX 7C.

[94] 18 U.S.C. 3006A(d)(1)–(3).

[95] The Administrative Office of the United States Courts and the Chief Justice of the Supreme Court took the position that after 1974 funds appropriated for the Federal CJA could only be applied to federal courts, and not to the District's newly created Superior Court. *See* H. Rep. No. 93–1172, 93d Cong., 2d Sess. pp. 1, 2 (1974).

[96] CX 230A-L; Carter 118.

boycott) lawyers compensated under the District's CJA were being paid according to a schedule fixed in the federal CJA over 10 years earlier: $30 per hour for in-court time; $20 per hour for out-of-court time; $1000 per case maximum for felonies; $400 per case maximum in misdemeanors; and $1000 per case maximum for appeals.

27. Actual payments to CJA lawyers are made through a voucher method. Vouchers showing the amount and nature of the time spent on a case are submitted to the presiding judge if the case proceeded to trial or to a judge in chambers if no trial was held.[97] The presiding judge has the authority to reduce the amount sought and in a small percentage of cases this authority has been exercised.[98] If the voucher seeks compensation beyond the maximum per case limits of $1,000 for a felony and $400 for a misdemeanor on the grounds that it was an extended or complex matter, the CJA lawyer must submit a statement justifying the request for extra compensation. These requests are reviewed by the presiding judge, and a recommendation in support of extra [33] compensation is then forwarded to the Chief Judge for ratification. Approximately five to ten percent of all vouchers submitted involve requests for compensation beyond the maximum limits. Most of these requests are approved.[99] The average voucher paid to a CJA attorney for trial work in the fiscal year ending September 30, 1983, was $231.21.[100]

28. CJA lawyers do not compete against each other to obtain appointments on the basis of hourly rates or the level of compensation per case. The rates paid per hour to CJA lawyers and the per case ceiling are established by statute, and the same compensation is paid to CJA lawyers irrespective of their level of skill, experience, or the quality of service they render. In short, under the D.C. CJA, there is no head-to-head price competition in the sense that CJA lawyers make price or hourly bids in seeking appointments. Instead, each CJA lawyer accepting an appointment automatically accepts the rate established in the D.C. CJA.[101]

29. The D.C. CJA contains no limitation on the total compensation a CJA lawyer may earn. However, a rule established by the Joint Committee on Judicial Administration limited the [34] maximum compensation to $42,000 per annum. Very few CJA lawyers reach the

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[97] If a case is not "papered", no voucher may be submitted even though the CJA lawyer put in time on the case before the U.S. attorney decided to drop charges. JX 2, p. 48; RX 55Z.

[98] A voucher may be cut, for example, if it reflects accurately that the CJA lawyer spent a significant amount of time at the courthouse waiting for a case to be called. JX 5, p. 70.

[99] Carter 172, 173. CJA lawyers know from experience, however, that there are certain categories of time spent on a case that should be avoided either in submitting a voucher below the maximum or in asking for an excess. These include hours spent on legal research, waiting in a judge's courtroom, or time spent (particularly in drug cases) in developing sentence alternatives to institutionalization. RX 74B, C. *See also* JX 5, p. 70, JX 10, pp. 82, 83; Lefstein 1438, 1439.

[100] CX 233L.

[101] JX 10, pp. 77, 78; Lefstein 1436.

$42,000 maximum.[102] After the 1983 boycott, the maximum was raised to $50,000.[103]

G. *The Impact Of The CJA Fee Level On The Criminal Justice System*

30. The impact of the pre-boycott fee level in the CJA bar was described as early as 1975 in the authoritative report of the Austern-Rezneck Committee, a joint undertaking of the Judicial Conference of the D.C. Circuit and the D.C. Bar.[104] Sweeping aside the cant surrounding indigency practice, the Austern-Rezneck Report described the huge gap between the facile assumptions behind the District's Criminal Justice Act and the realities of CJA practice.

> We are well beyond the point where it can be said that the criminal justice system in the District of Columbia can function without attorneys dedicated primarily to the practice of criminal law. Since close to 90% of all defendants in this city are indigent, criminal practice necessarily means CJA practice. The courts—especially D.C. Superior Court—seem to have recognized this. And, yet, criminal lawyers continue to be treated as appendages to the system. They **[35]** are desperately needed, but they are inadequately compensated and frequently abused.[105]
>
> —It is the community as a whole not a relatively small group of attorneys which should bear the financial burden of providing representation for indigent defendants.
>
> —A majority of the attorneys who practice regularly under the Criminal Justice Acts do this for a living. It is their primary source of income, notwithstanding the hope and expectation of Congress that the system can function with attorneys practicing CJA law as a sideline. There are too many cases, too few attorneys, and criminal practice necessarily demands a constant honing of skills and knowledge.[106]

31. The Austern-Rezneck Report found that the existing low rates impacted on all facets of the indigency problem: the ability to attract new talent to represent the poor; the willingness of experienced attorneys to continue in this work; and the quality of representation provided to indigents. Ultimately, the report concluded, the rates reflected on the depth of the District's commitment to protection of the constitutional rights of criminal defendants. **[36]**

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[102] JX 10, p. 81, JX 11, p. 124; CX 38N. It is the perception of CJA lawyers that their colleagues who "max out" (*i.e.*, earn the pre-boycott maximum of $42,000) tend to concentrate in the easier misdemeanors and plead out most of their case. JX 11, p. 107; Perrotta 652, 653. It is estimated that the average gross earnings of CJA regulars is about $20,000 per annum. JX 8, p. 77. *See also* JX 2, p. 86.

[103] Perrotta 652.

[104] The Austern-Rezneck Committee was assisted by a professional staff funded by a grant from LEAA and had several advisory panels drawn from the staffs of the U.S. Attorney's Office and PDS. RX 55B.

[105] The Austern-Rezneck reference to attorney abuse confirms the perception of some CJA lawyers that they are regarded by those in the criminal justice system (from marshalls to judges) as indistinguishable from their clients to the point that the CJA lawyers themselves are subject to being punished along with the criminals. JX 6, pp. 62, 70, 71; CX 80E. *See also* Addison 900, 901. A particular sore point with CJA lawyers was a court order providing that they were required to take child neglect cases, the bane of all indigency lawyers since it means that the appointed attorney must look after the child's interests for his or her entire minority. Addison 897, 898.

[106] RX 55Z–7, Z–8.

—The criminal justice system as now constituted may attract new talent, but cannot seem to keep it. Many able attorneys who want to practice criminal law find themselves caught in a dilemma between their sense of commitment and the personal and financial sacrifices involved in fulfilling that commitment. Few enter the practice of criminal law in the hopes of getting rich. But too often, the low rates of CJA compensation drive them out of the criminal law.

—It is axiomatic that lawyers are no different from other people. They cannot be expected to work for little or nothing, just as one would not expect a contractor to build a house without being paid for the cost of labor, materials, and overhead. Yet, criminal lawyers practicing under the Act are frequently asked to provide representation for which they are not paid, or paid very little. One of two things will happen: either the attorney will not do the work that a case requires, at great cost to the defendant, or he will do the work and suffer a financial loss.

—Finally and this is probably the most important point a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection. The indigent's rights under the Constitution are no less than the rights of the well-to-do. And, yet, if his counsel is not adequately paid, the indigent defendant has little reason to expect that his rights will receive the protection they would get if he could afford to retain counsel. Not only must the system protect his interests, it must *appear* to protect them if he is to have any confidence in it.[107]

32. The specific recommendations of the Austern-Rezneck Report, including raising fees to $40 for both in-court and out-of-court time, were as follows: [37]

Appropriations for the D.C. Criminal Justice Act must be increased to ensure that attorneys are adequately compensated and that defendants receive effective representation. The committee strongly supports the efforts of the Joint Committee on Judicial Administration of Superior Court and the D.C. Court of Appeals to obtain increased funding.

The rate of compensation under both the local and Federal Criminal Justice Acts should be raised to not less than $40 an hour for both in-court and out-of-court time.

Counsel should be compensated for work performed in any assigned CJA case, whether or not charges are filed.

The statutory maximum compensation for misdemeanor and felony cases should be raised to $800 or $1600, respectively.

The maximum compensation for representation in post-trial matters should be raised from $250 to $800 if the underlying case was a misdemeanor and to $1600 if the underlying case was a felony.

The $18,000 annual limit for CJA attorneys practicing in D.C. Superior Court should be abolished.

Claims for excess compensation should be treated like any other vouchers; that is, they should not be subject to approval of the trial judge and review by the chief judge of the court. If the disbursement agency has questions about a claim, these may be addressed

[107] RX 55Z–8, Z–9.

to the trial judge and the attorney, but it is the disbursement agency which should have final authority.

The $300 limit on compensation for experts, investigators, and other outside services should be mitigated by provisions for excess compensation to experts in appropriate cases.[108] [38]

33. The Austern-Rezneck Report was only one of a series of studies to reach the conclusion that the pre-boycott CJA fees were far too low. The CJA fee structure, however, remained at the $30/$20 level between 1975 and 1983 despite the prevalence of run-away inflation and the resulting erosion of even these minimal payments.[109] Further compounding the problem of the adequacy of CJA compensation during this period, was the imposition of additional procedural obligations on lawyers at the very time when the courts (and bar associations) indicated a willingness to consider claims of malpractice, ethical malfeasance, and possible violation of Sixth Amendment rights grounded on counsel's inadequate trial preparation in indigency cases.[110] This development alone meant that wary CJA lawyers had to spend more time representing each client than was required when the CJA rates were first set. Another trend that became apparent after the Austern-Rezneck Report was the influx of highly motivated young attorneys who had benefited from participation in clinical criminal programs and who came into CJA practice determined to provide quality representation.[111] Although the combination of the increasingly stringent standards for rendering effective assistance to indigents, and the work of these new CJA practitioners generally improved the overall [39] quality of representation after 1975,[112] criminal justice experts (including current and former District officials directly involved with the criminal justice system) reached the conclusion that the adverse effects of the low rate schedule observed earlier in the Austern-Rezneck Report had persisted into 1983. The consensus of this expert opinion may be summarized as follows—

First, because of the low rate of compensation, CJA regulars were compelled to maintain inordinately large caseloads. The size of a CJA lawyer's caseload, in turn, impacted on the ability to provide quality representation since an excessive caseload inevitably meant limited preparation and investigation time, the two essentials of effective advocacy.[113] This conflict between manageable caseload and compensation was more often than not resolved by the CJA lawyer accepting

[108] RX 55J, K.
[109] RX's 38Z–47, 39E, 54I.
[110] Hazard 1138–1142.
[111] Carter 229, Perrotta 775, 776, Hazard 1162, 1163.
[112] JX 3, pp. 155–157; CX 38H, I; Perrotta 742, 775, 776, Pickering 1085, Branton 1399.
[113] JX 5, pp. 65, 66; RX 25Z–21–Z–23; Hazard 1144–1146.

far too many appointments in order to make a bare living.[114]

Second, while CJA practice initially attracted able young attorneys, the low rates eventually drove experienced and capable CJA attorneys into more lucrative fields.[115] This loss of attorneys with two or three years experience was described by [40] Professor Hazard, an expert on the problem of maintaining professionalism in the criminal justice system, as the most pernicious effect of a low rate.[116] The tendency of low D.C. CJA rates to drive out of the criminal justice system the most experienced attorneys was also noted by Larry Polansky, Executive Officer of the D.C. Courts. Mr. Polansky observed that because of low D.C. CJA rates there was a changing cadre of CJA lawyers with many "blooded professionals" leaving when they "find that they just can't keep up with the pace necessary to make what is a minimal living out of CJA work".[117] Francis Carter, Director of PDS, agreed with this assessment. He testified that low D.C. CJA compensation discouraged the more ambitious and aggressive attorneys to the point where there was a regular pattern of attorneys staying in CJA practice for a short time and then leaving for financial reasons to seek other avenues of practice.[118] Professor Hazard concluded that the loss of experienced CJA lawyers was especially significant since it meant that there was a shortage of skilled practitioners to handle the low visibility but serious felonies that were not especially attractive to the pro bono departments of major uptown law firms.[119] [41]

Third, low CJA rates meant that indigency practice in the District was conducted under primitive conditions. CJA lawyers were attempting to meet the constitutional requirement of "Assistance" without offices, without secretarial assistance, without paralegals, and basically without any of the standard accouterments of a modern legal practice. Typically, they worked out of their homes and did their own typing.[120] According to Professor Lefstein, a former Director of PDS and an expert in the field of indigency representation, the lack of ordinary support services, which is the hallmark of CJA practice, is not a question of personal deprivation or diminished life style—it impacts directly on the ability of lawyers to represent their clients effectively.[121]

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[114] JX 8, p. 79, JX 9, pp. 31, 32, JX 12, p. 55; RX 90B, C, E, F; Branton 1410, 1411, Lefstein 1445. CJA lawyers estimate that they must close about 100 cases in order to gross the CJA average of $20,000 per annum. JX 12, p. 42; RX 90E, F.

[115] JX 2, p. 79, JX 7, pp. 26, 27; RX's 39F, 40A, 42I, 46I, 54J, 72A, B; Branton 1386, 1408, 1409, Lefstein 1440–1442.

[116] Hazard 1150–1152.

[117] RX 91C.

[118] Carter 228, 229.

[119] Hazard 1138–1144, 1150–1152.

[120] JX 8, p. 19, JX 10, p. 81; Isbell 1336, Lefstein 1439, 1440, 1447.

[121] Lefstein 1439, 1440. *See also* RX 39C. For evidence of the impact of CJA practice on the ability (and incentive) to keep current with legal developments, *see* JX 8, p. 83.

H. *The Pre-Boycott Campaign To Get Higher Fees*

34. Prior to the boycott, the CJA lawyers conducted a vigorous campaign to obtain higher fees. Although they received backing from every segment of the community concerned with the criminal justice system, the CJA lawyers were unable to convert this support into effective political action. (Findings 35 to 54.)

35. Interest in the problem of the CJA rates increased markedly after March, 1982, when the report of the Horsky Committee was published. This committee of 42 lawyers had been [42] formed by the D.C. Bar to assess the 1970 reorganization establishing Superior Court as the District's local court of criminal jurisdiction.[122] The Horsky Committee Report noted that the conditions described in the Austern-Rezneck Report had been aggravated by inflation, and recommended that all necessary steps should be "taken by the Superior Court, the Mayor, and the D.C. Council to raise promptly the levels of compensation for attorneys appointed under the Criminal Justice Act to at least the levels proposed by the Austern-Rezneck Committee."[123] Following publication of the report of the Horsky Committee, the D.C. Bar passed a resolution urging a CJA increase. This support of the uptown bar for the cause of the CJA lawyers has continued unfailingly to the present.[124]

36. On June 16, 1982, Bill No. 4–486 was introduced in the D.C. Council to "amend the D.C. Criminal Justice Act to provide a fair compensation level for attorneys appointed under that Act." The bill provided a $50 per hour rate of compensation, with no distinction drawn between in-court and out-of-court time. Bill No. 4–486 also proposed to increase maximum per case compensation to $1,700 for felonies, $900 for misdemeanors, and [43] $1,700 for post-trial matters.[125] Referred to the D.C. Council's Judiciary Commmittee for consideration, Bill No. 4–486 died at the end of 1982 before any hearings could be held because there was no prospect for passage in view of the lack of money to fund an increase in CJA compensation levels.[126]

37. In September, 1982, shortly after they were elected officers of SCTLA, Perrotta and Koskoff first became deeply involved in the effort to obtain legislation increasing compensation levels under the D.C. CJA.[127] Their first initiative was to discuss the adequacy of exist-

[122] RX 56D-U; Pickering 1058–1061.

[123] RX 56T, U.

[124] JX 13, pp. 27, 28; RX's 57, 59B, 71A-J, 143A, B; Perrotta 690–692, Koskoff 800, Pickering 1066, 1067, Isbell 1311, 1312, 1350–1352.

[125] RX 60A, B.

[126] JX 7, p. 28; RX 61; Perrotta 686–689, Koskoff 804, Pickering 1066, 1067, Isbell 1312, 1313.

[127] Even before Perrotta and Koskoff took over the leadership of SCTLA, CJA lawyers had lobbied for an increase. The response from the Mayor and Councilmembers before September, 1982, was almost unanimous support but no concrete results were achieved because of lack of funds. JX 2, pp. 53, 54, JX 7, pp. 23–25; Perrotta 679.

ing compensation levels with the Chief Judge of the Superior Court at one of the regular monthly meetings that the Chief Judge held with CJA lawyers. At the September meeting, which was also attended by Larry Polansky, the Court's administrative officer, the Chief Judge took the position that he could do nothing to support legislation increasing CJA rates because the court might have to rule on the legality of any bill passed by the D.C. Council. The Chief Judge and Mr. Polansky stated that they privately believed that CJA lawyers deserved an increase in compensation levels but [44] that the CJA lawyers would have to generate the political support for it.[128]

38. In November, 1982, Perrotta and Koskoff met with Herbert Reid, Counsel to the Mayor, to discuss legislation increasing D.C. CJA compensation levels.[129] Mr. Reid stated that in his view the D.C. CJA compensation levels were inadequate, and while he expressed his sympathy with the need for the legislation, he indicated that the Mayor could do nothing. According to Mr. Reid, since the CJA funds were included in the Superior Court's budget, Perrotta and Koskoff must first attempt to get the Chief Judge to urge a statutory change allowing for an increase. Mr. Reid said that in fact the Chief Judge had never done so, and that it was politically unrealistic to expect the Mayor to support such legislation when no one in authority was pressing for it. At the conclusion of the meeting, Koskoff and Perrotta asked to meet personally with the Mayor, but were told that because there was nothing to talk about, a meeting at that time would be pointless.

39. Perrotta and Koskoff met again with the Chief Judge of Superior Court in early December, 1982.[130] During this and subsequent monthly meetings, the subject of legislation to increase D.C. CJA compensation levels was discussed. The Chief Judge repeatedly took the position that the court could not [45] publicly support such legislation since it might be called upon later to rule on its legality.

40. In January, 1983, Perrotta and Koskoff met with Wiley Branton, then Dean of the Howard Law School.[131] Dean Branton was sought out because of the traditional leadership role of Howard Law School and its dean in the forefront of civil rights causes and civil liberties issues. Dean Branton also had a direct involvement in CJA problems: he had taken indigency appointments at the request of Superior Court judges, and he had assisted CJA attorneys and Howard law students in handling their cases as part of the school's criminal justice clinic. At this meeting, the SCTLA leaders asked Dean Branton for advice on how they should go about securing passage of

[128] Perrotta 679–681, Koskoff 794, 795.
[129] JX 13, pp. 28, 37; Perrotta 682, 683, Koskoff 796–799, 810.
[130] Koskoff 798, 799.
[131] Perrotta 689, 690, Koskoff 801–803, Branton 1379–1391.

legislation raising the level of CJA compensation. Dean Branton believed that the prospects of passage for such legislation were poor since there was no compelling political reason for generating the funds necessary for the increase. According to Dean Branton, the basic problem facing the CJA attorneys was the absence of an organized constituency to lobby effectively for the legislation. He noted that the indigent accused obviously had no political power; moreover, criminal defense bar was not held in high esteem by the Mayor, the D.C. Council, the leadership of the community, or the general public. Furthermore, an increase in compensation paid to criminal defense lawyers would not be considered high priority legislation so long as all the cases were being handled and the [**46**] system was running smoothly. Dean Branton advised the CJA attorneys that since the prospects for passage were dim "they were going to have to do something dramatic to attract attention in order to get any relief."[132] The thrust of his message was that because helping indigent criminal defendants is a politically unpopular cause and the city was not having any problems in getting its cases processed, it was going to be necessary for CJA attorneys to "raise hell".[133] During the course of the meeting, it was mentioned that some CJA attorneys were becoming discouraged and were thinking about a strike to draw attention to their plight. Dean Branton replied, "it may well have to come to that."[134]

41. The CJA lawyers, however, gave no serious consideration to a boycott in early 1983 because the legislative process leading to a possible increase was starting anew.[135] On March 17, 1983, D.C. Council Chairman David A. Clarke introduced Bill No. 5–128, providing for a per hour compensation rate of $35 for in-court and out-of-court time.[136]

42. The SCTLA leadership rallied an impressive body of support behind the bill, and when a hearing was held on June 6, 1983, before the Council's Judiciary Committee chaired by [**47**] Councilmember Wilhelmina Rolark, no witness opposed a CJA rate increase on the merits.[137] The executive branch of the D.C. government, however, again questioned the District's ability to absorb the additional costs of such an increase.[138]

43. Despite the strong showing made at the June 6 hearing, it soon

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[132] Branton 1390.

[133] Branton 1390.

[134] Branton 1391.

[135] Koskoff 803.

[136] CX's 34A, B, 36A-Y.

[137] Perrotta 697, Koskoff 808, Isbell 1314, 1315, 1326, 1327. Supporters included the D.C. Bar (RX 71A-J), Earl Silbert, the former U.S. Attorney for the District of Columbia (RX 72A-E), the American Civil Liberties Union (RX 73A, B), PDS and the Executive Office of the D.C. Courts (RX's 24A-G, 91A-N).

[138] CX 36F; RX's 86E, 87E, G.

became apparent to the CJA lawyers and their supporters that the hearing had been an empty gesture and that there was little prospect that anything further would happen on the bill.[139] In late June, Kemi Morton of Councilmember Rolark's staff told Koskoff that passage of the bill was unlikely because there was no source of funding.[140] Thereafter, Koskoff spoke with Councilmember Rolark and was informed that although the Council was sympathetic, no money was available to fund Bill No. 5–128.[141] Similarly, Betsy Reveal, the city's Budget Director, told the SCTLA leaders that the entire D.C. government supported their demand for higher fees, but that no money could be found.[142] [**48**]

44. These discouraging reports notwithstanding, Perrotta and Koskoff (and later respondent Addison) continued their lobbying effort throughout the summer of 1983. As part of this effort, Addison and Koskoff met with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations, to discuss the subject of possible federal funding to increase the level of compensation.[143] Mr. Leeth informed Addison and Koskoff that Congress was sensitive to the District's Home Rule status and therefore would not support an increase in rates under the D.C. CJA until the District itself had acted, either through a request from the Chief Judge of Superior Court or through a bill enacted by the D.C. Council.

45. In early August, 1983, Koskoff and Addison buttonholed the Mayor in a corridor of the District Building.[144] They asked again about the prospects for passage of Bill No. 5–128, and were told by the Mayor that he was sympathetic, but the money was not available to fund an increase, and that he did not know where the money would come from. Referring to a riot in city jail which inspired Congress to appoint seven new judges, improve the cell block, and carpet the courthouse, the Mayor spoke wryly of $28 [**49**] million falling "from the sky. . . . [but] there is no money for you."[145] The Mayor agreed to another meeting on August 29, 1983.

46. After the conversation with the Mayor, Addison and Koskoff informed the other CJA lawyers at an SCTLA meeting in the Lawyers' Lounge on August 7 or 8 that while they were repeatedly told by D.C. officials that they supported Bill No. 5–128, and that these officials recognized the need to increase the CJA compensation levels, these same officials insisted that no money could be found to fund the

[139] JX 12, p. 34, JX 13, p. 54; Perrotta 697, 698, Addison 881, 882, Isbell 1317, 1318, 1328.
[140] Koskoff 809.
[141] JX 13, p. 62; Perrotta 697, 698.
[142] JX 11, p. 94.
[143] JX 13, pp. 150, 151; Koskoff 811–814.
[144] JX 12, p. 37, JX 13, pp. 62–65; Koskoff 810, 811, Addison 884.
[145] JX 13, p. 64.

legislation.[146] On the basis of this report, the CJA lawyers voted to form a "Strike Committee" for the purpose of developing an action plan that went beyond the lobbying campaign. Perrotta named SCTLA member David Hirsch as temporary head of this Strike Committee.

47. Following the SCTLA meeting of August 7 or 8, the Strike Committee met in the office of CJA lawyer Roger Pickens.[147] The consensus at this meeting was that the previous lobbying efforts had been futile, that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that the boycott should aim for a $45 out-of-court and $55 in-court rate schedule.[148] Slaight was [50] designated at Chairperson of the Strike Committee and various other "strike" assignments were handed out.[149]

48. On August 11, 1983, a group of about 100 CJA lawyers met at an SCTLA meeting in the Lawyers' Lounge.[150] Addison and Koskoff again emphasized that the Mayor and Councilmember Rolark were sympathetic, but that both had insisted that there was no money available to fund Bill No. 5–128. They also reported that the Chief Judge had again refused to support a bill increasing rates. At this point, Slaight reviewed the substance of the discussion that had taken place at the Strike Committee meeting in Roger Pickens' office. Edward Shannon, a CJA regular, called for an immediate strike. This motion was voted down. Roger Pickens then moved to strike on September 6 if the statutory rates were not raised by then. Pickens' proposal carried by a voice vote, indicating solid agreement by the CJA lawyers not to call in for new cases if the pending legislation had not moved forward by the strike date.

49. Immediately following the August 11 SCTLA meeting, a petition was drafted by Strike Committee member David Hirsch and [51] edited by Perrotta.[151] The petition, which was placed on the blackboard of the Lawyers' Lounge in Superior Court, stated:

We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice

[146] JX 5, pp. 13–16; Addison 882–884.

[147] JX 6, pp. 21–24. The Strike Committee members were Joanne Slaight, Cheryl Stein, Abe Blitzer, Jeffrey Stulman, Ron Goodbread, Davies Couch, David Hirsch, and Roger Pickens. JX 5, p. 16, JX 10, pp. 20–23.

[148] JX 10, pp. 20–23.

[149] JX 10, pp. 32, 33. The Strike Committee designated Perrotta, Koskoff, and Addison as the "Negotiating Team". JX 5, pp. 23, 24. Assignments to other CJA lawyers included responsibility for contacting "all groups of lawyers who may support us or be used as strikebreakers," (CX 14), letting all CJA lawyers know about the boycott (JX 5, p. 26, JX 10, pp. 31, 32), soliciting the support of courthouse personnel (JX 5, p. 25, JX 8, p. 29, JX 10, pp. 34, 35) and working with the media. JX 5, p. 18, JX 10, pp. 31, 32.

[150] JX 8, pp. 24–27, 48, JX 10, pp. 18, 19, JX 11, pp. 28–33, 119, 120, JX 13, pp. 48–50, 78, 79.

[151] JX 6, pp. 35–38, JX 11, pp. 63–65.

Act.[152]

The petition was signed by a number of CJA attorneys including Addison and Slaight, but not by Koskoff or Perrotta.[153]

50. Although the CJA lawyers had already voted in favor of boycotting Superior Court, the lobbying effort of the SCTLA leadership continued throughout the late summer.[154] On August 29, 1983, Perrotta, Addison, and Koskoff, accompanied by Jacob Stein, former President of the D.C. Bar, met again with the Mayor at the District Building to review the prospects for passage of the legislation increasing CJA fees.[155] During the meeting, the Mayor said repeatedly that he supported Bill No. 5–128, that he knew CJA attorneys needed an increase, that it was long overdue, and that CJA attorneys did useful work at [52] extraordinarily low rates. He stated, however, that he did not know where he would find the money to fund the increase. He promised to make a concerted effort to do so, but indicated that it would be impossible to meet the September 6 deadline.

The August 29 meeting with the Mayor was very friendly. No threats were made on either side. The Mayor knew about the August 11 vote to stop calling in for new appointments after September 6 if the legislation did not pass by then. He made no effort to dissuade respondents from the boycott. During the meeting there was a lot of smiling back and forth, and the Mayor said, "You do what you have to do, and I will do what I have to do."[156] This was said in the context of his explanation that the normal legislative process takes several months, but if an emergency existed the legislative process could be expedited and a bill passed within a week or two. The Mayor explained that if there were an actual crisis at the courthouse, this would constitute an emergency to which he could respond.[157]

51. The record does not lend itself to a definitive finding on whether the pre-boycott 1982–1983 campaign of the CJA lawyers constituted exhaustion of the political process to the point that a continued lobbying would have been fruitless. To illustrate, there is testimony suggesting that an alternative political strategy, one presenting a unified CJA and PDS demand for increased overall indigency funds, may have been [53] productive.[158] The fact that the PDS budget is handled separately from the CJA budget (the CJA budget is buried within the

[152] CX 4B-D.

[153] JX 2, pp. 115, 116, JX 6, pp. 37, 38, JX 11, pp. 63, 64, JX 13, p. 131; Koskoff 814. Apparently, Perrotta and Koskoff abstained from signing the petition and voting in favor of the strike to avoid the charge that SCTLA officers had led an unwilling membership into a boycott. *See* JX 12, p. 36.

[154] JX 12, pp. 35–37, JX 13, p. 63; Addison 883.

[155] JX 5, p. 48, JX 11, pp. 41, 49, 121, JX 12, pp. 38, 72, JX 13, pp. 63–68; Perrotta 700-702, 721, Koskoff 815–817.

[156] JX 11, p. 49, JX 12, pp. 37, 38, 126, 127, JX 13, p. 65; Perrotta 701, Koskoff 816, 817.

[157] JX 11, p. 49, JX 12, pp. 38, 127.

[158] Carter 288–290. But for opinions respecting the dim prospects in 1983 for success from further political lobbying by SCTLA *see* Tucker 1265, 1266, 1270, 1271, Isbell 1328, 1330, Branton 1384, 1385, 1396.

Superior Court's appropriation; PDS is funded as a separate executive-level agency of the District's government) seems to be a lame excuse for the failure to make even an attempt at such a unified approach.[159] On the other hand, the record indicates that not only do PDS lawyers and CJA lawyers consider themselves rivals for whatever limited indigency funds are available, but that the day-to-day relationship between the two is strained to the point that effective political cooperation was unlikely.[160] In addition, it should be noted that the track record up to 1983 of unsuccessful attempts by even the most [**54**] prestigious, and presumably influential groups, to obtain increased compensation under the federal CJA, could not have inspired the CJA lawyers with confidence during the summer of 1983 that any modification in lobbying strategy would have produced markedly different results at the local level.[161]

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[159] *See* Perrotta 695, 696.

[160] By the very nature of its dichotomy between high volume and complex cases, the District's mixed system does not lend itself to a relationship of mutual respect and cooperation between PDS and CJA lawyers. Because of its limited caseload (concentrated in felony 1 cases), tradition of excellence, its well-known zeal on behalf of its indigent clients, and its reputation as an office where young lawyers are soon exposed to challenging litigation, PDS is swamped with applications from recent graduates of the most prestigious law schools. The very virtues of PDS, however, tend to install an elitist attitude among its lawyers that is not conducive to a close, mutually supportive relationship with the CJA lawyers who more often than not come from a more humble background. Carter 115, 116, 290, Lefstein 1422. For their part, the CJA lawyers seem to harbor a deep resentment over what is perceived as an unfair allocation of awards and brickbats—PDS is seen as garnering all the glory (and almost 40 percent of indigency funds for handling relatively few cases) while the CJA lawyers are treated contemptuously as "Fifth Streeters" even though they move over 85 percent of the cases through the District's criminal justice system. JX 11, pp. 132, 133; CX 80A-E; Addison 903–910. In addition to a general feeling of resentment, CJA lawyers have some specific grievances. One particular sore point straining the relationship between PDS and CJA lawyers is the dispute over investigators. PDS has a paid staff of investigators who are often by-passed in favor of a spirited group of volunteer college interns assigned to the PDS Office. When PDS investigators are not being used by PDS attorneys, however, the CJA Office of PDS insists that the CJA lawyers use these investigators. CJA lawyers, on the other hand, believe that they have no control over PDS investigators and would prefer to retain private investigators. This preference can easily be overruled since in the first instance CJA vouchers (including vouchers for outside investigators) are processed by personnel in the CJA Office which, of course, is a division within PDS. Perrotta 668–670, Addison 898, 899. Even apart from the question of PDS investigators, other PDS services available to CJA lawyers—library, motions file, appellate brief file, access to PDS duty-day attorney to answer questions about criminal law procedure, and assistance to CJA counsel in formulating alternatives to incarceration —are not highly valued by CJA regulars. O'Neill 533, 534, Perrotta 667, 668.

[161] *See* Perrotta 761–762. An increase in the federal CJA level would have at least authorized the Joint Committee on Judicial Administration to raise the D.C. rates even without new legislation from the D.C. Council. *See* Finding 26. The most recent effort for an increase in the federal CJA began in 1980 when the Judicial Conference of the United States and the National Association of Former United States Attorneys adopted resolutions supporting an increase in the federal rates. In 1981, the Judicial Conference transmitted a draft bill to Congress. It was introduced in the House but no further action was taken. The American Bar Association in 1982 adopted a resolution favoring an increase. And again in 1983, the Judicial Conference urged the passage of a rate increase. Hearings were finally held on a rate bill in June and July, 1983. While support was almost universal, the Department of Justice opposed the bill on the grounds that the increase should be considered as part of a comprehensive examination of fees, including fees in civil cases. Because of Justice opposition, no further action was taken on the federal bill in 1983. RX's 35A–37R, 40A-T, 42A–49C. On October 15, 1984, however, the following item appeared in the "Lawyers" column (p. B2) of the *Washington Post:*

> Members of Congress couldn't have been in more of a hurry to get out of town last week. Before they left, however, they approved a measure of interest to attorneys in federal courts here and around the country: doubling the salary of lawyers who represent indigent defendants in criminal cases before the federal bench.
>
> The measure raises the hourly rate lawyers receive from $20 for work out of court and $30 for court appearances to $40 and $60 an hour, respectively. That should come as a welcome relief to the attorneys. Many had drifted away from the federal court here after lawyers in D.C. Superior Court negotiated a hefty raise from city officials following a walkout last year.
>
> But the question now is: How will Superior Court attorneys react to the new federal pay? The new federal

(footnote cont'd)

52. Although there is room to speculate on the soundness of the lobbying strategy adopted by the CJA lawyers, there can be no serious question that the pre-boycott efforts of the CJA lawyers [**55**] had largely failed because indigent criminals and their lawyers are not a politically significant constituency; on the contrary, there is political capital to be made if the rights of the [**56**] indigent accused are denigrated.[162] This hostility toward criminal defendants generally has a carry-over effect to the funding for the lawyers who represent them.[163] Moreover, at a time when all programs must contend for scarce public funds (by law, the District must adopt a balanced budget)[164] funding for indigency programs may be resisted on the grounds that more aggressive representation by criminal lawyers, which might be made possible, say, by reducing the caseloads of CJA lawyers, is precisely what the community does not want since it may interfere [**57**] with the efficient processing of bodies through the criminal justice system.[165]

53. The inability of lawyers for the indigent to command political support (on both the national and local levels) may also reflect the spillover effect from the public's image of the criminal lawyer. In general, this image is not favorable. First, there is the public perception of a few "mouthpieces" who are, in effect, house counsel for the organized crime groups which run the nation's gambling, prostitution, and narcotics traffic.[166] Second, many of our larger cities harbor a distinct non-indigent criminal bar of low legal ability and dubious ethical quality which one expert described as follows:

> These lawyers haunt the vicinity of the criminal courts seeking out clients who can pay a modest fee. Some have referral arrangements with bondsmen, policemen, or minor court officials. They negotiate guilty pleas and try cases without investigation, preparation, or concern for the particular needs of their clients. Because the prosecution is frequently willing to recommend a light sentence in exchange for a guilty plea in a routine case, the dispositions which these lawyers arrange often appear satisfactory to defendants and other laymen who are ignorant of the fact that the result owes little to the capability of the lawyer. Fed by this ignorance, the reputation of the courthouse

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rate is substantially higher than the new local one, which is $35 an hour for work in or out of court.

Traditionally, the local rate is pegged to what lawyers get in federal court. It remains to be seen whether lawyers will invoke this to get another raise from D.C. officials.

Whether or not the federal CJA would have gone up without the pressure engendered by an increase in District CJA rates is, of course, not developed in this record.

[162] JX 11, p. 134, JX 12, p. 41; RX's 26V, W, 79A, B; Addison 881, Hazard 1153. This lack of political support for indigency programs is by no means unique to the District. The general failure of criminal indigency program to attract support can best be illustrated by the fact that in the allocation of public funds, the indigency programs are usually left out in the cold. Nationally, indigent defense receives about 1.5 percent of state and local government criminal justice funds whereas prosecution services receive 5.9 percent, the judiciary 13.1 percent, corrections 24.7 percent, and police protection 53.2 percent. RX 26S. *See also* Lefstein 1486.

[163] Hazard 1153, Lefstein 1486.

[164] Tucker 1247.

[165] JX 11, p. 105, JX 12, p. 54; Perrotta 689, 690, Addison 908–911.

[166] RX 28N.

lawyer grows, and he attracts a substantial portion of the paying criminal business. The insufficiency of his performance thereby comes to taint in [58] large measure the image of all defense counsel.[167]

Finally, in the District itself, the CJA bar is not made up entirely of dedicated idealists. *See* Finding 25.

54. A possible contributing factor in the failure of the pre-boycott efforts of the CJA lawyers, may have been widespread ignorance about the District's mixed system. Even many uptown lawyers were under the mistaken impression that PDS, rather than the CJA lawyers, carried most of the indigency burden.[168]

I. *The Boycott*

55. By late August, 1983, based on their perception that the lobbying effort had failed, SCTLA activities thereafter were directed thereafter at assuring the success of the boycott scheduled to begin on September 6. The leading uptown firms were urged by SCTLA (in a letter over Perrotta's signature) to "support [SCTLA's] goals by not making your firm available to accept cases during this period."[169] Later, SCTLA leaders addressed several lawyers' associations, and their plea that [59] members of these associations not take indigency cases after September 6, was answered affirmatively.[170] Since almost all the CJA lawyers had already indicated their agreement with the boycott, little had to be done in the way of additional persuasion, but all CJA lawyers were contacted to make certain of their support.[171] In addition, an effort was made to persuade the few hold-outs among the CJA lawyers to join with their colleagues in the boycott.[172]

56. Beginning on September 6, 1983, the named individual respondents and all but a few CJA regulars stopped calling in to the CJA Office for the purpose of having their names placed on the daily list of attorneys willing to accept CJA appointments.[173]

57. The immediate goal of the boycott was to increase the compensation paid to CJA lawyers.[174] The CJA lawyers also believed that their rate of compensation was directly related to the quality of representa-

[167] RX 28N-"O".

[168] JX 12, p. 33. *See also* Addison 880 for evidence that members of City Council and the Mayor's office were unaware of either the number of cases CJA lawyers were forced to take in order to survive or the primitive conditions under which they were working.

[169] CX 6A. The 40 firms contacted by the SCTLA Strike Committee were the same firms PDS approached later for volunteers. *See* CX7 A-D. The list of firms, consisting of those with the most conspicuous pro bono programs, was originally compiled by the D.C. Bar for the use by PDS, but at the request of SCTLA it was sent to the Strike Committee. JX 10, pp. 42, 43, JX 11, pp. 70–73, JX 13, p. 142; Perrotta 711, 712, 746–748, Isbell 1345.

[170] JX 10, p. 49. *See also* JX 5, pp. 34, 35.

[171] CX's 8A–10J.

[172] O'Neill 543, 544.

[173] JX 13, pp. 71, 111. At most, 13 of the CJA regulars continued to take assignments. CX's 216D, 217E, 218E, 221E, 228E; Robinson 362–367, 380.

[174] JX 5, p. 30, JX 7, p. 34, JX 8, pp. 35, 36, JX 10, p. 108, JX 11, p. 32, JX 13, pp. 90, 91; CX 4B.

tion provided to indigents since it almost compelled them to carry an excessive caseload and allowed [60] for none of the essential support services identified with a professional practice.[175]

58. In addition to the refusal by the CJA lawyers to take on new cases, SCTLA staged a series of events—rallies, picket lines, handouts of "press kits", newspaper and T.V. interviews—all designed to educate the general public about the plight of the CJA lawyers in the expectation that this would result in additional pressure on the District government to increase fees.[176] These efforts were initiated by the Strike Committee, which had been formed after the August 7 or 8 SCTLA meeting in Roger Pickens' office, and which by August 26 was clearly identified as the "SCTLA Strike Committee".[177] While the hoopla organized by SCTLA did attract media attention and editorial support,[178] there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure.[179] [61]

59. If respondents tend to overemphasize the so-called "educational" aspects of the boycott, complaint counsel are inclined to do the same with their charge of physical harassment. A few minor incidents of doubtful propriety aside,[180] the CJA boycott was a peaceful effort.[181]

60. The expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system.[182] This expectation was fully realized for essentially three reasons.

First, the incidence of crime in the District does not subside because of the sudden nonavailability of lawyers.[183]

Second, the criminal law requirements that a lawyer be assigned to each case almost immediately upon arrest of the accused and that the assigned lawyer's investigation and preparation proceed apace to meet certain early deadlines—arraignment or presentment date, preliminary hearing, status hearing—are not changed either by the sudden nonavailability [62] of enough lawyers or the imposition of

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[175] JX 8, p. 80, JX 9, p. 31, JX 10, pp. 18, 19, 25, 100–102, JX 12, p. 118; CX's 8D-K, 38I; Slaight 958–960.

[176] JX 1, ¶ 50, JX 5, pp. 46, 47, JX 8, pp. 41, 84, 85, JX 10, pp. 48, 49, 55, 56, JX 12, pp. 62, 90; CX 6C-J; RX 106A-D; Koskoff 818–822, Addison 885, 886, Kline 923–927, Slaight 960–962.

[177] JX 10, pp. 32, 33, 122; CX's 8A, 14.

[178] RX's 110A–139.

[179] *See* Slaight 943.

[180] *See* JX 5, pp. 70, 71, JX 8, pp. 63, 64, JX 10, pp. 57, 58; McEwen 454, 455 for use of a "scab" poster with names of non-boycotting CJA lawyers and Robinson 342, McEwen 449–453, 458, 492, O'Neill 550–553 for some rude treatment of the non-boycotters.

[181] JX 3, p. 180, JX 5, p. 26, JX 9, p. 39, JX 12, pp. 107, 108; O'Neill 542–544.

[182] JX 5, pp. 75, 76; CX 234; *See also* Perrotta 740.

[183] During the period from September 6 to September 20, there was a daily average of 63 defendants on the weekday lock-up list and 43 on the Saturday list. CX's 216A–228E.

massive caseloads on those who are available.[184]

Third, there was no one to replace the CJA regulars, and makeshift measures were totally inadequate.[185] A few days after the September 6 deadline, PDS was swamped with cases.[186] The handful of CJA regulars who continued to take cases were soon overloaded.[187] The overall response of the uptown lawyers to the PDS call for help was feeble,[188] reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their [**63**] underlying support for the demands of the CJA lawyers.[189] Most of the law student volunteers initially observed the boycott, and later all law student volunteers were limited (as they usually are) to a relatively few minor misdemeanors.[190]

61. The boycott succeeded when key figures in the District's criminal justice system—Francis Carter of PDS and the Chief Judge of Superior Court—became convinced that the system was on the brink of collapse because of the refusal of the CJA lawyers to take on new cases. On September 15, 1983, PDS hand-delivered to the Mayor, the Chief Judge, and Councilmember Rolark the following letter:

Dear Mayor Barry:

We are writing to apprise you of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia. We believe that despite substantial efforts by the Public Defender Service of the District of Columbia ("the Service") the current difficulties in providing counsel in these cases will, by early next week, reach a crisis point.

As you know, the private attorneys who regularly make themselves available to the court for this type of representation are compensated under the District of Columbia Criminal Justice Act, 11 D.C. Code 2601 *et seq.*, at a rate of $20.00 an hour for out-of-court time and $30.00 an hour for in-court time. In August of this year the members of the Superior Court Trial Lawyers Association announced that commending on September 6, 1983 they would no longer accept cases for [**64**] indigents because this low rate of compensation prevented them from providing adequate legal representation. Attorneys employed by the Public Defender Service to represent indigent defendants

[184] JX 2, pp. 110–114, JX 5, pp. 62–64, 73; CX 231B; RX 105A-J; McEwen 415–420, 448, 449, O'Neill 553–555, Perrotta 703–705, Kline 932, 933.

[185] JX 6, p. 69, JX 10, pp. 65, 85–87, JX 11, p. 45, JX 12, p. 80, JX 13, pp. 76, 101; Isbell 1352, 1353, 1367, 1368.

[186] JX 5, p. 72; Carter 95–97.

[187] JX 3, pp. 150–152; CX's 216A–228E; McEwen 444, 445, O'Neill 545, 546. Prior to the boycott some 35 to 40 CJA regulars called in daily. Robinson 323. After September 6, no more than three or four CJA regulars called in each day. JX 6, p. 69, JX 8, pp. 73, 74; Robinson 380. The number of cases handled by CJA regulars dropped from 85 percent of the total to under 8 percent. Robinson 380.

[188] JX 13, pp. 192, 193; Carter 99–102, 274, 275, Robinson 338, 339. The uptown bar's response was barely adequate at the outset of the boycott, and fell off precipitously in the second week, amounting in all to a handful of associates who picked up a few misdemeanors. Carter 95, 99, 100, Robinson 338, 339.

[189] JX 10, p. 47, JX 13, pp. 192, 193; Lefstein 1479–1484, Branton 1404–1406. In the serious case likely to go to trial, this self-doubt is fully justified, and for the lawyer who does not specialize in criminal law to take such a case would amount to malpractice. Hazard 1158.

[190] Carter 98, Robinson 339, 340.

in criminal cases are not compensated under the Criminal Justice Act, for PDS attorneys are full-time salaried employees and are statutorily prohibited from engaging in any other practice of law or receiving any fee. Since September 6 the Service's attorneys (small in number when compared to the need) have assumed the representation of a very sizable number of the indigent defendants, sometimes as many as eight or nine a day per attorney. This added burden comes at a time when the PDS attorneys were already handling very high caseloads. Therefore, the Service now finds its resources taxed to a point where as of the beginning of next week it can no longer provide this quantity of assistance to the criminal justice system while continuing to render quality, effective legal representation.

Additionally, during this very trying period for the court, the Service has had the overwhelming task of continuing to ". . . coordinate the operation of a . . . system for appointment of private attorneys to represent . . ." indigent defendants. D.C. Code § 1–2702(b). We have done this by soliciting assistance from members of our local bar whether they are in solo practice or small or large firms in our city. While the response thus far has been gratifying, it has not been sufficient to continue to assure the appointment of counsel for all indigent defendants. The daily need for representation of indigent defendants (sometimes over 80 such cases a day) has at this point seriously depleted the resources of the private bar who have volunteered to help the court. This leads the Service to conclude that future assistance from this source is problematic, at best.

We respectfully but strongly believe it is imperative for you, together with Councilmember Wilhelmina J. Rolark, Chairperson of the Council's Committee on the Judiciary, and Chief Judge Moultrie of the Superior Court, as leaders and members of the three branches of the city's government to meet before the end of this week to decide on an immediate course of action to address the situation. You are aware that the Service and several other individuals and organizations testified on June 6, 1983 in favor of Bill No. 5–128 (the District of Columbia Criminal Justice Improvements Act of 1983) before the Committee on the Judiciary of the District of Columbia Council. This legislation will, among other things, increase all hourly rates of the local Criminal Justice Act to [**65**] $35.00 an hour. A public declaration of your unified support for this Bill and of specific efforts to effect its enactment would, we believe, help greatly to resolve the present situation. In urging this initial course of action, we understand that the enactment of Bill 5–128 would have some fiscal ramifications. But the Service hopes that any additional appropriations necessitated by enactment of the Bill will be viewed not only in the context of a given fiscal year but also in the context of the absence of any intervening adjustments over more than a decade. From that perspective, larger CJA appropriations constitute a very modest investment.

We would be happy to provide you with more particular information on this crisis and will be happy to meet with you, if necessary, but the need for expedited action cannot be overemphasized.

Sincerely,

/s/ Vincent H. Cohen
Chairman, Board of Trustees

/s/ Francis D. Carter
Director
Public Defender Service[191]

62. The serious situation depicted in the PDS letter was confirmed

[191] CX 31A-C.

when the Chief Judge of Superior Court informed the Mayor that the criminal justice system was approaching a crisis point.[192]

63. Upon receipt of the PDS letter, the Mayor telephoned Koskoff to request a meeting that very evening (September 15) **[66]** with her, Perrotta, and Addison at a downtown restaurant.[193] The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott. The Mayor then stated that since an emergency now existed, Bill No. 5–128 could be taken up as emergency legislation. He indicated that he would make a public expression of support for the bill by writing a letter to Councilmember Rolark stating that the necessary money to fund the increased compensation levels provided for in Bill No. 5–128 would be found. The Mayor next discussed the mechanics by which the bill could be considered as emergency legislation. He stated that Councilmember Rolark had already informed him of her willingness to mark up and report an emergency bill out of the Judiciary Committee on Monday, September 19. Furthermore, the Mayor said that he understood that D.C. Council Chairman Clarke would suspend the rules of the Council and bring the bill before the Council the following day, Tuesday, September 20, and that the bill would pass on September 20, as an emergency measure. The Mayor explained that two versions of 5–128 would be considered—an emergency bill, which would pass immediately, and an identical permanent bill, which would have to go through the usual legislative process. The Mayor said he would sign the emergency bill as soon as it was passed. In response to Addison's question about when the CJA lawyers should return to work, the Mayor answered by recalling his days as a civil rights organizer, and **[67]** based on that experience, he said that if he were in the same position of the boycotting CJA lawyers, he would not begin calling in to accept appointments until after the emergency bill had passed. The Mayor also informed the SCTLA leaders that he would agree to support still another bill to increase CJA hourly rates to the $45/$55 level after Bill No. 5–128 had passed in both its emergency and regular forms, but that this bill, too, would have to be considered in the normal course of events.

64. On September 16, 1983, the Mayor wrote to Councilmember Rolark.

[B]ecause I believe in the importance of quality representation for indigent defendants and appreciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate

[192] Isbell 1352. During the course of the boycott, the Chief Judge indicated that he was sympathetic to the demands of the CJA lawyers but he opposed the use of a boycott. RX 140; Isbell 1352, 1353. Several associate judges of Superior Court expressed their support for both the objective and the method. JX 13, p. 82.

[193] JX 11, pp. 44–48, JX 12, p. 80, JX 13, pp. 73–76, 100, 101; Perrotta 720–724, Koskoff 824–827.

reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.

As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.[194] [68]

65. On the same day that the Mayor was writing his letter, Koskoff and Addison were meeting with Councilmember Rolark at the District Building.[195] Councilmember Rolark explained the emergency legislative process, and stated that her committee would mark up two versions of Bill No. 5–128 at a committee meeting on Monday, one to go through regular channels and the other to be considered as emergency legislation. Councilmember Rolark stated that she was willing to expedite passage of the emergency legislation, that she had always been concerned about the issues underlying Bill No. 5–128, and that she was glad that the Mayor had found a way to fund the emergency bill. Councilmember Rolark, Koskoff and Addison then went down the hall to the office of Council Chairman Clarke. Council Chairman Clarke stated that he would move to suspend the rules so the Council could consider Bill No. 5–128. Koskoff expressed her concern that some striking CJA attorneys would not accept the Mayor's proposal because they sought fees above the $35 level. Councilmembers Clarke and Rolark agreed to introduce a permanent bill to increase CJA hourly rates to the $45/$55 level. Koskoff also requested Councilmembers Clarke and Rolark to accompany her to the Superior Court Building to explain the Mayor's proposal to CJA attorneys who continued to demand a $45/$55 hourly [69] rate.[196] Councilmembers Clarke and Rolark agreed to do so, and a meeting was held in a conference room at the Superior Court during the afternoon of September 16.[197] Those present at this meeting included Koskoff and Slaight, as well as CJA lawyers James Tatem, Davies Couch, and Roger Pickens. Also present were Claudia Schlosberg of the Family Division Trial Lawyers Association, and David Isbell, President of the D.C. Bar. The proposal of the Mayor and Councilmembers Clarke and Rolark was reviewed at

[194] CX 36X, Y.

[195] JX 13, pp. 96–99; Koskoff 827–831.

[196] When the SCTLA Strike Committee was first formed, the $45/$55 rate was prominently mentioned. *See* Finding 47. Koskoff and Perrotta reached the conclusion that these levels were not politically feasible and had convinced most CJA lawyers to moderate their demands. Those who remained adament about the $45/$55 rate were organized around the so-called "Ad Hoc Committee" led by Roger Pickens. JX 12, pp. 83, 115. Pickens is not a member of SCTLA.

[197] JX 8, p. 47, JX 10, pp. 66, 67, JX 13, pp. 99, 100, 103, 104; Koskoff 830, Isbell 1350–1352.

the meeting, including the emergency legislative procedures. Councilmembers Clarke and Rolark also reiterated their willingness to introduce a bill to increase hourly rates to the $45/$55 level, but this bill would be in permanent form only and would have to be taken up in the normal course of legislative business. Council Chairman Clarke stated firmly that the $35 rate was all the D.C. Council would currently pass. He presented the proposal as a take it or leave it proposition, saying nothing would be passed if the CJA lawyers rejected it, and that he had to know by 1:00 p.m. on September 19 whether the CJA lawyers [**70**] would return to work if Bill No. 5–128 were to pass on an emergency basis.[198]

66. At noon on September 19, 1983, SCTLA convened a meeting of CJA attorneys in the Lawyers' Lounge to consider whether to accept the $35 proposal and to end the boycott.[199] The meeting, which was attended by over 100 CJA attorneys, was presided over by Perrotta as President of SCTLA. The Mayor's proposal and the emergency legislative process for enacting Bill No. 5–128 were reviewed by Perrotta. Debate was then held with each side allotted 10 minutes to make its case. Perrotta, Koskoff and Addison spoke in favor of accepting the proposal. Roger Pickens and James Tatem spoke against acceptance, favoring, instead, continued refusal to accept new appointments until hourly rates were increased to $55 per hour for in-court time and $45 for out-of-court time. After the debate, a voice vote was taken. Those in favor of accepting the Mayor's proposal prevailed. The vote was then communicated by Koskoff to Councilmember Rolark's office by the 1:00 p.m. deadline set by Council Chairman Clarke.

67. At 2:00 p.m. on September 19, 1983, a meeting of the D.C. City Council's Judiciary Committee was convened.[200] The Committee reported out Bill No. 5–128. The bill, and a Committee Report, prepared by Councilmember Rolark, were both unanimously [**71**] approved by the Judiciary Committee, and forwarded to the D.C. Council for consideration at its September 20 meeting.

68. At the September 20, 1983, meeting of the D.C. City Council, Council Chairman Clarke suspended the rules for consideration on an emergency basis of Bill No. 5–128. The bill was passed unanimously by voice vote.[201]

69. On September 21, 1983, the CJA regulars resumed calling in to

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[198] JX 8, p. 47, JX 10, pp. 66, 67.

[199] JX 5, p. 50, JX 7, pp. 35, 36, JX 10, pp. 70–72, JX 11, pp. 50–55, JX 12, pp. 85, 86, JX 13, pp. 105–109, 160, 161; Koskoff 831, 832.

[200] Koskoff 832.

[201] CX 35C. The permanent form of the bill was passed on October 4, and both versions were signed by the Mayor on October 11, 1983. CX 35A-C; RX 150A, B. After passage of the permanent bill, Councilmember Rolark fulfilled her commitment to the CJA lawyers (*see* Finding 65) by introducing a bill to raise the rate to the $45/$55 level. RX 177A-D.

accept new appointments.[202]

70. Respondents' argument that the CJA lawyers lacked the power to create a court emergency and thereby force the District government into passing Bill No. 5–128 is contradicted by the entire record. The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded. Moreover, the claim of relative weakness of the CJA lawyers is totally inconsistent with respondents' own voluminous evidence proving the vital role played by CJA lawyers in the District's criminal justice system.[203] Perhaps even more significant is the fact that District officials (PDS Director, Mayor, Chief Judge, Councilmembers) must have realized (as the record plainly shows) that the use of emergency alternatives to the CJA lawyers—voluntary or compulsory pro bono from the uptown bar, increased [72] use of law students, or expanded PDS—constituted no meaningful restraint on the power of the CJA lawyers. As a matter of fact, the SCTLA leadership themselves had argued that since uptown lawyers had no real intention of permanently replacing them, a temporary stint downtown in the criminal justice system would accomplish nothing.[204] Certainly no long-term alternative to the CJA lawyers would have solved the emergency situation; besides, the District government had no reason to believe that there was readily available a viable long-term alternative to its mixed system, and without such alternatives, the role of the CJA lawyers as an essential component of the existing system was manifest.[205]

J. The Effects Of The Boycott

71. The cost of the boycott to the District will be approximately $4 to $5 million a year in additional CJA expenditures.[206] The District's total annual budget is almost $2 billion.[207]

72. In addition to higher costs for the city, the immediate impact of the boycott on the criminal justice system has been a sharp increase in the number of lawyers willing to take on CJA [73] cases because of the higher fee schedule.[208] There is some speculation in the record that at the increased fees experienced lawyers will be encouraged to continue CJA work for a longer period of time, court administrators will have a greater choice among lawyers willing to do CJA work thereby opening up the possibility of a quality certification program,

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[202] JX 13, p. 71; RX 149A-J.

[203] *See* Finding 19.

[204] JX 12, pp. 38, 39, 105.

[205] *See* Finding 21.

[206] JX 1, ¶ 46(f); CX's 36W, 38D. An increase of this size was described by PDS Director Carter as a "very modest investment" when viewed "in the context of the absence of any intervening adjustments over more than a decade." CX 31B, C.

[207] JX 1, ¶ 48.

[208] JX 2, p. 85; RX's 163A–168B; Carter 255, 256, 260, Robinson 356, 357, Perrotta 677, 743, 744, Koskoff 836, 837, 858.

reduced caseloads made possible by the rate increase will result in more aggressive representation of clients, and that some CJA lawyers may now be able to afford office space and the other amenities of a professional practice.[209] The record, however, suggests that these sanguine predictions must be tempered with the realization that criminal law itself tends to burn out all but the most monetarily successful, and that a dramatic transformation in the quality of indigency practice is unlikely.[210] Perhaps all that can reasonably be expected from the modest boycott-inspired fee increase is that the more dedicated CJA practitioners will have an incentive to continue their work by some indefinite margin beyond the point when it would otherwise end. This is no small achievement. As one seasoned observer of the field has noted—[74]

A defense lawyer must expect to lose more cases than he wins, generally not for reasons related to his legal capabilities, but because most defendants whose cases are not dismissed early in the process are ultimately convicted. Men with enough dedication and self-assurance to accept repeated defeats without coming to doubt the value of their efforts are no easier to find in the bar than anywhere else. All but the most eminent criminal lawyers are bound to spend much of their time in overcrowded, physically unpleasant courts, generally dealing with people who are educationally, economically, and socially underprivileged. It is not the sort of working environment that most professional men choose.[211] [75]

III.

Discussion

The District of Columbia's CJA lawyers, some 100 private practitioners regularly representing indigents in criminal cases before Superior Court, agree that they will not take additional cases unless their fees are raised. The Commission's complaint challenging this concerted action as an illegal boycott under Section 5 of the Federal Trade Commission Act raises three issues: Is the boycott totally exempt from the antitrust laws? Is it a per se violation? Or should the boycott be considered under a rule of reason analysis that takes into account the proffered justifications and the actual effects of the ac-

[209] JX 2, pp. 87, 89, JX 3, p. 205, JX 5, p. 61, JX 6, pp. 69, 70, JX 8, pp. 80, 81, JX 10, pp. 79–81, JX 11, pp. 122, 123; Perrotta 677, 726, 728, 729, 732–736, Koskoff 837, 838, Addison 887, 888, Hazard 1153, 1154, Lefstein 1539, 1540. The perception of experts is that the District's mixed system suffers from the absence of any effective quality control in the certification and assignment of CJA lawyers. Hazard 1168–1171. *See also* CX 231A-D, for the certification recommendations of the Braman Committee.

[210] CX 80E; RX 80A, B; Slaight 958, 959, Lefstein 1511.

[211] RX 28N. *See* RX 55T for the enervating experience of uptown lawyers drafted to defend indigents in 1974. *See also* JX 2, pp. 49–51, JX 10, pp. 100, 101, 124, 125, JX 13, pp. 23, 24 for accounts of some of the more frustrating aspects of criminal law practice (uncompensated waiting periods and the pressure of arranging the logistics of appearances scheduled in some 43 courtrooms) and JX 7, pp. 22, 23, JX 9, p. 47 for a description of the depressing physical surroundings in which CJA law is practiced.

tion?[212]

Turning first to the defenses, respondents contend that the antitrust laws never enter the picture at all because the boycott was a form of political action protected by the First Amendment. Respondents also maintain that even if the boycott does not qualify as protected political action, it was nevertheless a form of petitioning for legislative change (*i.e.*, **[76]** a statutory increase in fees) exempt from the antitrust laws under the *Noerr-Pennington* doctrine. Finally, respondents argue that the public welfare motivation for the boycott—the concern of CJA lawyers that the Sixth Amendment rights of their indigent clients might not be protected adequately unless CJA rates were raised—amounts to a cognizable justification under a rule of reason analysis applicable to the professions.[213]

On the question of political action in the form of a boycott, the Supreme Court recently held in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) that the First Amendment rights of speech, assembly, association, and petition, served to immunize from antitrust liability the peaceful aspects of an NAACP-inspired boycott of the white merchants of Port Gibson and Claiborne County, Mississippi. The boycott was imposed after the NAACP's list of "Demands for Racial Justice" was received with indifference by city and county officials. Starting from the **[77]** premise that the "right of business entities to 'associate' to suppress competition may be curtailed" (*id.* at 912), the Court applied a motive test in distinguishing between such parochially-minded economic conduct and what it characterized as the NAACP's "political activity". *Id.* at 913. As for the impact of the boycott, the Court reasoned that since the *Noerr-Pennington* doctrine affords First Amendment protection, irrespective of motive or effect, to a petition filed for the economic purpose of fostering anticompetitive legislation, then it necessarily follows that a politically motivated boycott—characterized by the Court as a form of petition qualifying

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[212] Throughout this discussion I have used the term "boycott" to describe respondents' action although in standard antitrust usage a boycott is a concerted refusal to deal aimed at driving a competitor from the market. The term, however, has been expanded to cover a concerted refusal to deal for the purpose of increasing prices and I use it in this broader sense, as the Commission did in *Michigan State Medical Society*, 101 F.T.C. 191, 287 (1983). *See also St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 at 541 (1978) ("The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.").

[213] Respondents also assert that SCTLA is too amorphous an organization to be subjected to FTC jurisdiction or an FTC cease and desist order. Although SCTLA is loosely organized and its membership is hard to pin down, the role of this organization in the September boycott can hardly be gainsaid. Its meetings in the Lawyers' Lounge of Superior Court were the rallying point for the boycott, and its officials were the leaders of this action. To suggest that SCTLA's failure to adhere strictly to Robert's Rules, or its casual attitude toward the collection of dues, or the fact that its meetings are not held in more elegant surroundings, somehow presents a jurisdictional bar to the Commission, would gratuitiously engraft a proviso onto Section 4 of the Federal Trade Commission Act without the support of a single cited authority. SCTLA, an unincorporated association, was organized for the profit of its members (*see, e.g., American Medical Assoc.*, 94 F.T.C. 701, *aff'd*, 638 F.2d 443 (2d Cir.), *aff'd mem.*, 455 U.S. 676 (1982)) and since its activities are in or affect commerce in the District of Columbia, it is subject to the Commission's jurisdiction. If an order were appropriate, it could be enforced against SCTLA.

for similar First Amendment consideration—must also be exempt from the antitrust laws even though the NAACP "[L]ike the railroads in *Noerr* . . . foresaw—and directly intended—that [the object of the boycott] would sustain economic injury as a result of their campaign." *Id.*[214] [78]

Although *Claiborne* borrows freely from *Noerr-Pennington* on the issue of economic effect, it creates a discrete barrier to the "political action" defense. By its terms, *Claiborne* may be invoked only when the boycott is politically motivated since it is only in that special context that the Court treats the communicative aspects of a boycott as a form of petitioning or constitutionally protected expressive speech.[215] If the action is not politically motivated, there is nothing in *Claiborne* that expands on what *Noerr-Pennington* allows businessmen or professionals to do in the way of a joint effort to persuade government. In other words, both before and after *Claiborne, Noerr-Pennington* applies only to certain tactics used to influence legislative or administrative decisions: standard, [79] noncoercive forms of petitioning or lobbying such as speech, advertising, and the distribution of literature. Thus the *Noerr* Court explicitly held that the doctrine does not exempt "the use of such devices as . . . boycotts . . ." 365 U.S. at 136,[216] and this restriction is not modified by *Claiborne,* except, of course, in the case of politically motivated action.

Respondents' attempt to show that the CJA boycott meets the strict limitations set out above and therefore qualifies as either exempt political action under *Claiborne* or as an immune petition under *Noerr-Pennington* is similar to the defenses raised and rejected in *Michigan State Medical Society,* 101 F.T.C. 191 (1983) [hereinafter

[214] In *Eastern R. Conf. v. Noerr Motors,* 365 U.S. 127 (1961) the railroads and their public relations firm mounted an advertising campaign designed to foster the adoption of laws restricting the ability of the trucking industry to haul heavy freight over long distances. Even though this effort was marked by misrepresentation and severely impacted on the truckers, the Supreme Court held that the Sherman Act was not intended to regulate joint activity directed toward informing the government, and to impute such a purpose to the antitrust laws would raise serious constitutional questions under the First Amendment. *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965) involved a lobbying campaign by the union and large coal mine operators intended to persuade the Secretary of Labor to establish wage rates that would impact adversely on small mines. In holding that the lobbying activity was protected by *Noerr,* the Supreme Court separated the underlying illegal conspiracy between the union and the operators from their right to engage in joint petitioning. The constitutional basis of the *Noerr-Pennington* exception, which was left uncertain in the earlier decisions, was clarified in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972).

[215] The Court does not spell out in detail why a politically motivated trade restraint in the form of a boycott should receive this special antitrust exemption except to observe that the expression of opinion on controversial public affairs issues has always been placed so high in the hierarchy of First Amendment values that we accept the notion that there should be little restriction on how these issues are debated. *Claiborne,* 458 U.S. 913. Consistent with this view, the Court cites with approval *Missouri v. NOW,* 620 F.2d 1301 (8th Cir.) *cert. denied,* 449 U.S. 842 (1980), but it does so only for the narrow proposition that the right of petition is so important that even when exercised by way of a boycott, it is not subject to state tort law. *Claiborne,* 458 U.S. 886, 914, n. 48. By its limited use of *NOW,* the Court implicitly cautions against acceptance of the Eighth Circuit's conclusion that a politically motivated boycott (there, a NOW hotel and convention boycott designed to pressure Missouri into adopting ERA) is exempt because neither the legislative history of the Sherman Act nor the cases interpreting the legislative history reveal that Congress intended to prohibit a restraint undertaken for such a purpose.

[216] *See also* 365 U.S. at 142 ("There are no specific findings that [the railroads] attempted directly to persuade anyone not to deal with the [truckers]").

MSMS]. In *MSMS,* the Commission held that a threat by an association representing 80 percent of Michigan doctors to withdraw services unless Blue Cross/Blue Shield fee schedules were revised and state Medicaid cuts were restored, went beyond petitioning protected by *Noerr-Pennington,* and because such threats directly interfered with competitive relationships among the doctors themselves and between the doctors and the third party payers, it was not exempt as a politically motivated action under *Claiborne.* The Commission thus clearly signaled in *MSMS* that it intends to limit sharply the availability of both the "petitioning" and "political action" defenses, and that any coercive combination of suppliers aimed at what is called the "competitive process" (101 F.T.C. at 300, 301) [**80**] will be distinguished from both a permissible political boycott and a permissible communicative petition with the result that it will receive neither *Claiborne* nor *Noerr-Pennington* immunity.

Faced with *MSMS*'s narrow interpretation of the application of *Claiborne* and *Noerr-Pennington,* respondents maintain that its 1983 boycott was indeed "political" and not within the "competitive process" language of *MSMS* because CJA rates are not set by head-to-head competition among CJA lawyers, but are established instead by legislation mandating a uniform rate for all CJA lawyers. The difficulty with this argument is that in *MSMS* the Commission did not equate the term "competitive process" with direct competition. For irrespective of the vigor of the head-to-head contest among Michigan doctors, the Commission indicated that it was concerned in *MSMS* with competition in a larger sense: a marketplace confrontation in which price is set not by dealings between individual doctor and patient, but by negotiations between associations of doctors and either third party insurers or the government acting as surrogates for the patient population. The Commission invoked Section 5 because it did not want to see relative power in this kind of special market distorted by the use of a coercive tactic that might levy otherwise unjustified costs.

Furthermore, under the Commission's treatment of *Claiborne* in *MSMS,* if a coercive tactic is applied to the "competitive process", it does not become an expressive political petition merely because the boycotters are convinced that as a disfavored group (say, lawyers representing another disfavored group, [**81**] indigent criminals) they could not communicate effectively the connection between their own economic well-being and a political objective. In drawing a sharp line of demarcation at where it will recognize the political action rubric (or if you will the expressive petition concept) the Commission, in effect, said that for purposes of granting or denying a total antitrust exemption, neither label will apply if, in the context of a buyer-seller

confrontation, professionals combine for the purpose of economic gain, irrespective of any ancillary connection between this economic objective and some difficult to achieve but laudable political goal.[217] [82]

As for the *Noerr-Pennington* doctrine, contrary to respondents' argument, I see nothing in the Commission's decision in *MSMS* suggesting that its availability will turn on whether price is eventually set by legislation, as is the case here (and in *Noerr*) or by negotiation with an administrator who is delegated by statute with the right to make pricing decisions, as in the Michigan doctors case (and in *Pennington*). In either instance, all that is exempt under *Noerr-Pennington* is the right to petition—that is, to make one's views known—which not only is protected by the First Amendment, but also is encouraged by the public policy favoring the free flow of information to the government. But as the Commission indicated in *MSMS*, this communicative function of petitioning is isolated by *Noerr*-[83] *Pennington* from any underlying boycott, which must then stand on its own when tested under the antitrust laws.[218]

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[217] If there is no interference with the "competitive process" (*i.e.*, a marketplace relationship between buyer and seller does not exist) the Commission intimates in *MSMS* that it may allow the political defense even if the coercive tactics aim for a political objective that translates into direct economic gain. This appears to be the basis for the distinction drawn in *MSMS* between the Michigan doctors' threat of a boycott from the actual boycott in *Crown Central Petroleum Corp. v. Waldman*, 486 F.Supp. 759 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). In *Crown Central*, gas station operators agreed not to sell gasoline to consumers in order to pressure the Department of Energy into raising the retail price ceiling. Applying a balancing test to the dealer's boycott, the district court held that since the action was not aimed at competition in any sense, and represented the only effective way for the gasoline dealers to exercise their First Amendment right to bring their views to the government's attention, the conduct was a permissible form of joint political expression protected by *Noerr-Pennington*. The importance of *Crown Central* as precedent was diminished, however, when a contrary result was reached in *Osborne v. Pennsylvania-Delaware Serv. Station Dealers Ass'n*, 499 F.Supp. 553 (D.Del. 1980). There the district court held that dealers' boycott aimed at the Department of Energy was joint political activity, but it was not exempt since *United States v. O'Brien*, 391 U.S. 367 (1968) allows for regulation of even manifestly political activity—

> . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

While a decision on the obvious tensions between *Crown Central* and *Osborne* and resolution of the apparent conflict between *Claiborne* and *O'Brien* might define more precisely the bounds of permissible political activity, *MSMS* says in no uncertain terms that the Commission will not allow the political label to be used once there is any form of "competition", broadly defined as a marketplace confrontation, which includes government as a buyer of services provided by a profession.

[218] *See also Feminist Women's Health Center v. Mohammad*, 586 F.2d 530 (5th Cir.), *cert. denied*, 444 U.S. 924 (1979) (letters from a hospital medical staff and medical societies reporting to the state board of medical examiners alleged inadequacies in the post-operative procedures of an abortion clinic receive antitrust immunity under *Noerr-Pennington*, but any underlying conspiracy to eliminate the clinic by use of coercion is subject to antitrust scrutiny). Complaint counsel seem to be arguing at times that even apart from the use of coercive tactic, there may have been an illegal agreement here when the leadership of SCTLA convened meetings at which there was discussion about the appropriate fee level to be included in proposed legislation—$35 or $45 or some higher amount. Given the fact that all CJA lawyers are paid uniform fees as determined by statute, and that CJA lawyers, like any other interest group, have a right to petition for favorable legislation, I doubt that such a theory could survive the constitutional exemption of *Noerr-Pennington*. As for the line of cases that suggest that *Noerr-Pennington* may not apply at all if there is a commercial relationship between government and a seller claiming the exemption, this limitation has only been invoked when the so-called "petition" was in the form of a rigged bid or similar price-fixing device. *See, e.g., George R. Whitten, Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir.),

(footnote cont'd)

In addition to the claim that the boycott should receive a total constitutional exemption on the basis of *Claiborne* and *Noerr-Pennington,* respondents also submit that they are entitled to immunity on the grounds that a fee increase is directly related to their status as professionals who have the responsibility of protecting the Sixth Amendment rights of their indigent clients. This is simply a restatement of the argument that professional status alone merits a total antitrust exemption, a defense that should have been laid to rest after [84] *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) where the Court said flatly that irrespective of its public-service aspects, the practice of law is a business, as demonstrated most pointedly in conduct directed at fees—the very issue involved here and in *Goldfarb.* But while *Goldfarb* plainly means that respondents are entitled to no blanket exception from the antitrust laws on the grounds that the CJA segment of the legal profession performs a useful or even a constitutionally-mandated function advanced by the boycott, this seminal opinion also suggests that the special public service role of the professions may justify a departure from black letter antitrust law, including rules relating to boycotts. In its now famous footnote 17, the Court said:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether the particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.[219]

The fleshing out of the cautionary language cited above began in *Goldfarb* itself where notwithstanding footnote 17 the [85] Court treated the questioned practice—a county bar association's minimum fee schedule for title examination—as price-fixing and per se illegal. The Virginia lawyers essentially sought an immunity from antitrust regulation based solely on their status as a learned profession, and any arguments that may have been made about the public service aspects of the profession were obviously lost in defense of a title search, part and parcel of a standard commercial transaction.

That footnote 17 was more than a gloss became evident, however, in subsequent cases in which the Supreme Court has demonstrated a

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cert. denied, 400 U.S. 850 (1970). In any event, as I read the complaint it does not challenge the right of commonly-affected lawyers to forge a position and then to urge a city to adopt it. The issue here is the antitrust consequences of going beyond mere petitioning to the point that joint action not covered by *Noerr-Pennington* (a boycott) is used.

[219] 421 U.S. at 788–89, n. 17.

reluctance to exclude public interest considerations in evaluating professional restraints. This trend can be seen, for example, in *Nat. Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). Citing to footnote 17, the Court raised the possibility that "ethical norms" (an undefined term) may be justified under a rule of reason approach (*id.* at 696), but rejected as "grossly overbroad" (*id.* at 699–700 (Blackman, J., concurring)) the notion that any competitive bidding would so tempt the engineers to ignore safety factors that a total exemption from the antitrust laws was in order. The Court would not accept such a "frontal assault" on the basic policy of the Sherman Act since it rested on the vague premise that any competition was a potential threat to public safety. *Id.* at 695. What *Professional Engineers* did not answer is how the Court would treat an "ethical norm", which had a marginal impact on competition, was shown by past history (say, a [86] record of collapsing buildings and bridges) to be justified, and was rationally tailored to meet such a proven need.

Following *Professional Engineers,* the possible availability of a public interest exemption for the professions suggested by footnote 17 was again signalled in *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982). There the Court held that a doctors' maximum fee schedule built into a health insurance plan was per se illegal since the maximum fee might tend to become the minimum. But the continued viability of footnote 17 was immediately reaffirmed as the Court noted that "[t]he respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers,* that the quality of the professional service that their members provide is enhanced by the price restraint." *Id.* at 349. Thus notwithstanding its previous rejection of "quality of professional service" justifications in *Goldfarb* and *Professional Engineers,* the Court went out of its way in *Maricopa* to establish the possible availability of just such a defense in the proper case.

Taken together, *Goldfarb, Professional Engineers,* and *Maricopa* can be read as saying that while the professions will receive no blanket antitrust immunity for practices resembling illegal commercial activity, the special public service aspects of the professions may require some caution in applying per se rules, and under certain circumstances, policy considerations may excuse the restraint entirely. In *MSMS,* still another caveat was added by the Commission: in treating restraints in professional areas where the Commission has had little previous experience, [87] the per se rules, which exclude even the proffer of a justification, should be applied with special care. The Commission then went on in *MSMS* to grapple with the problem inherent in footnote 17 of evaluating the adequacy of the justifications proffered. Respecting the pressure on Blue Cross/Blue Shield, the respondents apparently wanted the Commission to mediate the

bitterly conflicting claims of the doctors and the Blues and decide whether fee schedules should in fact have been adjusted upward. If an increase was in order (a point heatedly denied by the insurers) then presumably the boycott was justified. The Commission refused to become embroiled in this controversy, and thus rejected out-of-hand the notion that an FTC proceeding is the proper forum for resolving disputes over the adequacy of fees. As for the threatened boycott of state Medicaid, the doctors claimed that unless Medicaid payments were increased the field would be left to disreputable "Medicaid Mills." The Commission did not treat at length with this argument except to note that the doctors could have exercised their rights of petition under *Noerr-Pennington* and brought their views before the Michigan legislature without resorting to collective threats. In all, the justifications advanced in *MSMS* were characterized by the Commission as "either very weak or non-existent". 101 F.T.C. at 296.

How far the Commission would have allowed the doctors to go in the way of showing a justification is not made clear in *MSMS* and is a bone of contention between the parties here. Complaint counsel argue that footnote 17 and its progeny were interpreted [88] by the Commission as meaning that the only justification allowable is evidence relating to procompetitive "efficiencies"—that is, whether the concerted activity enhanced competition by injecting new forms of competition, reducing entry barriers, or facilitating or broadening consumer choice. While complaint counsel are correct that these points are stressed, the Commission did not exclude quality and patient care arguments. It merely stated that on the facts of this case such arguments could have been made by means short of a boycott. 101 F.T.C. at 294–95. More importantly, complaint counsel's interpretation of *MSMS* would tend to diminish the actual language of footnote 17 since the Court spoke there of "the public service aspect" of the professions—a much broader perspective than the "enhancement of competition" test pressed by complaint counsel. In short, the Court in *Goldfarb* seems to recognize that there may be special problems of public policy properly within the concern of the professions, and that these problems need not be shunted aside in total deference to the economist's perception of efficiencies.

Some insight into what the *Goldfarb* Court may have had in mind in the way of justification was provided in *Wilk v. American Medical Ass'n,* 719 F.2d 207 (7th Cir.), *cert. denied,* 104 S.Ct. 2399 (1984), a case involving concerted activity by doctors aimed at limiting the hospital privileges of chiropractors. The Seventh Circuit, applying the rationale of footnote 17, concluded that under a rule of reason analysis it would allow the doctors to show (1) that the action was motivated by a genuine concern for patient care, (2) that this concern is objec-

tively [89] reasonable, (3) that the concern was the dominant motivating factor behind the action, and (4) that this concern for patient care could not have been adequately satisfied in a manner less restrictive of competition. *Id.* at 227.

There is nothing in *Wilk, Maricopa, Professional Engineers,* or *Goldfarb,* however, which even hints at expanding the rule of reason to accommodate the kind of "quality of care" justification advanced here by respondents—namely, that a group of professionals should be allowed to engage in collective activity so that they may increase their fees up to a level that permits them to serve their clients better. In *Wilk,* for example, the doctors did not argue that chiropractors had to be excluded from hospitals so that medical fees could be increased. By the same token, in *Maricopa* the majority and the dissent did not part company over a possible connection between the income level of Arizona practitioners and better care for the hospitalized: the issue there was whether the Court should look behind the questioned plan to determine if it might serve the interests of patients as a cost containing alternative to existing health insurance. Only in *Professional Engineers* do we see a defense in an antitrust case that even comes close to the one advanced here by the CJA lawyers—a restraint imposed for the purpose of obtaining or protecting a so-called reasonable level of professional income should receive antitrust immunity because the public will suffer if the engineers suffer. The Court gave short shrift to this "frontal assault" on the antitrust laws, and there is no reason to expect that it would be any more receptive to an [90] antitrust defense grounded, for example, on the notion that what's good for the county bar is good for the rest of the county, or any variation thereof requiring (a) a suspension in belief about the prevalence of selfless group pricing decisions, and (b) a willingness (or the wherewithal) to determine the reasonableness of a particular price.[220]

Up to this point I have dealt solely with the adequacy of the exemptions and the justifications advanced by respondents. For the reasons given above, I believe that they would all fail to pass antitrust muster. Arguably, this matter should then be disposed of by invoking *MSMS'* modified per se rule without further investigation of effects or market power. But given the Commission's total lack of institutional experience in dealing with the constitutional, political, and social pressures

[220] A recent decision heavily relied upon by respondents, *Kreuzer v. American Academy of Periodonotology (sic),* 5 Trade Reg. Rep. (CCH) ¶ 66,029 (D.C. Cir. 1984) has nothing to do with increasing fees to a reasonable level so that professionals might improve "quality of care." On the contrary, *Kreuzer,* like *Wilk,* strongly suggests that the rationale of footnote 17 will have no application when the economic self-interest of the profession is apparent, and that it will be confined instead to the context of self-regulation, restrictive membership rules, or other technical requirement directed toward a legitimate patient care purpose. Thus in *Kreuzer* the issue was whether a limited practice requirement for membership in an association of dental specialists (*i.e.,* certified periodontists could not practice periodontal prosthesis), which at least ostensibly was unrelated to the members' own economic interests, served to improve patient care by assuring a high level of periodontic skill.

permeating the criminal justice field, I was persuaded in the trial of this matter to allow respondents to make a full record so that both the trier of the facts and the reviewing authorities [91] might have before them any special circumstances surrounding a boycott in this unfamiliar area.[221]

What the record shows is that the level of CJA fees is the end result of a legislative process that reflects, among other things, the low regard by the public for the constituency involved (indigent criminals and their lawyers), an assessment of what will satisfy the constitutional requirement for effective representation, the lofty sentiment that all lawyers owe a professional obligation to represent indigents, the budgetary pressures of conflicting priorities, and whatever influence the CJA lawyers can bring to bear in support of their demands for higher fees. These factors have nothing to do with ordinary market forces in the sense that there is an expectation on the part of the buyer (the D.C. government) that rates will be affected by any meaningful competition among CJA lawyers. On the other hand, ordinarily there is also no expectation by the buyer that the mechanism for setting price, which here happens to be [92] legislative, will be disrupted by the imposition of coercion by the sellers (the CJA lawyers) in the form of a boycott.

As for the effect of the boycott, certainly once it was imposed it was successful in accomplishing what it set out to do—to force an increase in the fees of CJA lawyers by creating an emergency and thus putting pressure on the District government to pass the required legislation. But it was a singularly curious form of coercion. For the record also shows that the boycott was not vigorously opposed by the Mayor who believed that an increase was fully merited but could not be brought about unless the city was confronted with an actual emergency demonstrating the importance of the CJA lawyers to the administration of the criminal justice system.[222] (The Mayor was hardly alone in his view that an increase was justified; as far as this record will allow, every expert who had studied the problem had concluded that

[221] I also find some support for this approach in *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) where the per se price-fixing label was withheld from a form of boycott—a concerted refusal to license individual music compositions and the use instead of a "blanket license". The Court indicated that the background facts—the development of the blanket license in response to a market embracing thousands of users, a host of copyright owners, and millions of compositions—require a discriminating examination of the putative restraint under a rule of reason analysis. Similarly, in *NCAA v. Board of Regents*, 52 U.S.L.W. 4928 (June 27, 1984), the Court held that where an unconventional market is involved (there athletic competition requiring a balance of power among market participants) the per se rule against output restrictions, which might otherwise apply to an NCAA limitation on the number of football games member colleges could telecast, should be suspended in favor of a rule of reason approach that weighs actual adverse effects.

[222] The ambivalent role played by the District government in the events surrounding the CJA rate increase may explain its failure to invoke the city's own antitrust laws (JX 14C, ¶ 4; CX 240A-L), as well as the conspicuous absence of District officials as supporters of the complaint. This cool reaction by those most directly affected stands in marked contrast to the vigorous state opposition elsewhere to boycotts organized by professional groups for the purpose of securing favorable legislation. *See, e.g., New York v. Roth*, 1979-2 Trade Cases ¶ 62,828 (Nassau County Ct. 1979).

the pre-boycott rates, which had not been adjusted for over 10 years, were woefully inadequate.)

In summary, under *MSMS* the professionals who sell legal services to the city receive no blanket "political action" or "petitioning" antitrust exemptions or access to special "quality of care" justifications when they act in concert in order to [93] obtain higher fees. And if the city had not been so supportive of the boycotters' demands (or to put it somewhat differently, if the identity of the victim was not so elusive) I have little doubt that an order would be appropriate. However, when the seller's action is accompanied by the buyer's knowing wink, this suggests that presumptions about the way free markets work and the inevitable adverse effects flowing from this kind of concerted activity should be saved for another day—perhaps one when the buyer is more determined to deal at arm's length with the seller over the adequacy of compensation paid for an essential service.

In reaching the conclusion that the Commission should depart here from the strong authority of *MSMS* on the narrowest possible antitrust grounds—no adverse effects in the special circumstances of the 1983 boycott—I necessarily assume, as I have emphasized throughout this discussion, that on the basis of *MSMS* all of respondents' proferred justifications and claimed exceptions, including those grounded on the political action defense, would be rejected if tested solely within the four corners of the Commission's earlier opinion. But while *MSMS* is clearly binding on an ALJ, I am constrained to point out that the Commission's handling of the constitutional problem raised by *Claiborne—i.e.,* the Commission's bright line separation of politically motivated action from coercion directed at the "competitive process" —assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent. As it happens, the record here lends itself to more [94] than just a colorable claim of strong political motivation even though the immediate objective of the boycott was a fee increase. Thus the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of a rate change. But even more important is the evidence indicating that city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (*i.e.,* constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly

against pressing for an unnecessary and possibly uncertain confrontation between the Commission's antitrust perspective, which would treat this boycott solely in terms of presumed adverse effects upon the competitive process, and broader constitutional principles, which may allow for an expressive demonstration if the political motivation evidence is credible.[223] I see no point in striving resolutely for an antitrust triumph in this sensitive area when this particular case can be disposed of on a more pragmatic basis—there was no harm done. **[95]**

IV.

Conclusions of Law

1. The Superior Court Trial Lawyers Association ("SCTLA") is subject to the jurisdiction of the Federal Trade Commission. In addition, the Federal Trade Commission has jurisdiction over the named individual respondents and the subject matter of this complaint.

2. SCTLA, the named individual respondents, as well as the members of SCTLA and other CJA attorneys, put into effect on September 6, 1983, a boycott of Superior Court. This boycott took the form of a concerted refusal to accept new indigency assignments unless the existing fee schedule was raised.

3. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not a form of political action protected by *Claiborne*.

4. Under the holding in *MSMS*, the boycott by SCTLA and the CJA lawyers was not political petitioning exempt from the antitrust laws by *Noerr-Pennington*.

5. Since the boycott by SCTLA and the CJA lawyers was designed to improve the economic well-being of the CJA lawyers, it is not within the ambit of the public service caveat for the professions suggested by footnote 17 of *Goldfarb*, notwithstanding the fact that the action was also motivated by a genuine belief among CJA lawyers that their ability to render effective representation to indigent criminal defendants was directly connected to a rate increase. **[96]**

6. In the context of the special circumstances of this case, it cannot be presumed that the higher costs attributable to the 1983 boycott are adverse effects. On the contrary, the evidence strongly indicates that in this instance the boycott was viewed by city officials as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment.

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[223] *See* Note, *A Market Power Test For Noncommercial Boycotts*, 93 Yale L.J. 523 (1984).

Accordingly, the following order should be issued.

Order

The complaint is dismissed.

Opinion of the Commission

By Azcuenaga, *Commissioner:*

In the summer of 1983, the District of Columbia Superior Court Trial Lawyers Association ("SCTLA"), its officers, members and other lawyers agreed to stop providing legal services to the District of Columbia for indigent criminal defendants, until the District increased the fees it paid for such services. In furtherance of their agreement, the individual respondents and other SCTLA lawyers refused to accept new indigency cases beginning September 6, 1983, until the District raised the fees. On September 20, 1983, in order to resolve the crisis [2]caused by the boycott in its program for the legal representation of indigents, the District government enacted emergency legislation to increase the fees it paid under the Criminal Justice Act ("CJA")[1] to lawyers who participated in the program.

The Commission issued a complaint alleging that the Superior Court Trial Lawyers Association, the three named officers of the association, and the chairperson of the SCTLA Strike Committee entered into an agreement to restrain trade by refusing to compete for or to accept new CJA appointments unless the fees were raised. The complaint alleges that this conduct constitutes a conspiracy to fix prices and to conduct a boycott in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

After a hearing, the Administrative Law Judge found that the Superior Court Trial Lawyers Association and the named respondents had engaged in a concerted refusal to deal for the purpose of increasing the CJA fees and that the boycott had the effect of increasing those fees. He also concluded that the boycott was not political action protected by the First Amendment from application of the antitrust laws. The Administrative Law Judge nevertheless dismissed the complaint on the ground that the boycott had no adverse effects, because an increase in the CJA fees was necessary to "satisfy the 'political' (*i.e.*, [3] constitutional) requirement of effective representation"[2] and

[1] D.C. Code Ann. §§ 11-2601 to -2609 (1981).

[2] I.D., slip op. at 94. We use the following abbreviations in this opinion:

I.D. – Initial Decision
I.D.F. – Initial Decision Finding
R.A.B. – Respondents' Answering Brief
JX – Joint Exhibit

(footnote cont'd)

that the strike was the "only feasible way" to secure the increase.[3]

We affirm the Administrative Law Judge's conclusions that the respondents engaged in a concerted refusal to deal for the purpose of raising prices and that their boycott is not immune under the First Amendment from the antitrust laws.[4] We reverse the Administrative Law Judge's decision as to liability, and we conclude instead that the SCTLA lawyers' boycott was a *per se* violation of Section 5 of the Federal Trade Commission Act. Our conclusion would be the same under a rule of reason analysis.

THE FACTS

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." If the [4] accused cannot afford counsel, then counsel must be appointed by the court.[5] In order to comply with the requirements of the Sixth Amendment to provide counsel for indigent criminal defendants, the District of Columbia provides a mixed system of private lawyers compensated under the Criminal Justice Act and government lawyers employed by the District's Public Defender Service ("PDS").[6]

By statute, the Public Defender Service may represent only indigent criminal defendants who are charged with an offense punishable by imprisonment for six months or more and may represent no more than 60 percent of the indigents in this category.[7] Private practitioners appointed and paid under the Criminal Justice Act provide most of the remaining balance of the representation of indigents.[8] PDS lawyers handle the more serious felony cases, and the CJA lawyers provide the larger volume of the District's criminal indigency representation.[9] In fiscal year 1982, CJA lawyers handled 19,475 of the 25,000 misdemeanor indigency cases closed that year and approximately 4,000 felony cases, usually those involving less serious felonies than those handled by the PDS lawyers. [5]

Every member in good standing of the District bar who has a local address and telephone number and who registers with the CJA office of the Public Defender Service is eligible for assignment of cases under the CJA. Although more than 1,200 private attorneys are regis-

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CX – Complaint Counsel's Exhibit

Testimony is cited by the name of the witness followed by the transcript page.

[3] I.D., slip op. at 96.

[4] The Commission's findings of fact and conclusions of law are stated in this opinion. The findings and conclusions of the Administrative Law Judge, except as specifically adopted herein, are rejected.

[5] *See, e.g., United States v. Cronic*, 466 U.S. 648 (1984).

[6] I.D.F. 15.

[7] I.D.F. 17.

[8] In addition, private attorneys working on a *pro bono* basis and third-year students from local law schools participating in clinical programs provide about 5% of the legal representation for indigent defendants. I.D.F. 20.

[9] I.D.F. 19.

tered for CJA assignments, most appointments go to approximately 100 CJA "regulars," who derive almost all their income from representing indigents and make themselves available to take CJA appointments on a regular basis.[10]

Case assignments under the CJA are generally made on a rotation basis by a judge or commissioner, who assigns a CJA attorney from the daily list of those who have called in for CJA appointments to each eligible person listed on the daily lock-up list. The assigning commissioner or judge may depart from this rotation in order to assign a particularly complex case to a more experienced attorney, to limit a new attorney to misdemeanor cases, or to accommodate an attorney's request that he or she be assigned only to a particular type of case (*e.g.*, only felonies or only misdemeanors).[11] The most important case assignment criterion, however, is availability.[12]

In 1983, before the strike, the CJA fees paid by the District were set at $20 per hour for out-of-court time and $30 per hour for in-court time, with case maximums of $1,000 for [6] felonies, $400 for misdemeanors and $1,000 for appeals.[13] Each lawyer was also limited to annual maximum earnings under the CJA program of $42,000.[14] The amount of compensation actually paid to a CJA lawyer in each case is subject to the approval of the presiding judge, who has the authority to reduce the amount sought, although this is done in only a small percentage of cases. Occasionally, a lawyer may request compensation greater than the established per case limit on the ground that the particular case was extended or complex. Most of these requests are approved.[15]

The Superior Court Trial Lawyers Association is a loosely organized group of CJA-registered lawyers. Because lawyers are constantly entering and leaving CJA practice, the membership of the Association is difficult to determine precisely. Technically, membership and the right to vote in elections depend upon the payment of annual dues, but this requirement has not been enforced vigorously. In practice, virtually any lawyer who is registered for CJA assignments can participate in SCTLA [7] meetings, vote in elections and even hold office in the organization.[16]

Despite its loose structure, the SCTLA was the "rallying point" for

[10] I.D.F. 18.

[11] I.D.F. 22 & 23.

[12] I.D.F. 24.

[13] I.D.F. 26. The District's Criminal Justice Act, D.C. Code Ann. § 11–2604(a), provided for compensation of CJA attorneys "at a rate . . . not to exceed the hourly scale established by" the federal statute for appointed counsel, 18 U.S.C. 3006A(d). The District's preboycott fees were equal to the federal maximum. The 1983 amendment to the District's Criminal Justice Act provides for fees "not to exceed the rate of $35 per hour."

[14] I.D.F. 29; Carter Tr. 132. The annual ceiling was increased to $50,000 after the boycott.

[15] I.D.F. 27.

[16] I.D.F. 3.

the CJA lawyers at the time of their strike.[17] The Association held informal meetings from time to time in the lawyers' lounge of the Superior Court, it had a board of directors and elected officers, and it maintained a bank account. At one time, the SCTLA organized a political action committee that collected funds and made contributions to political candidates who supported an increase in the level of fees paid under the CJA. Officers of the SCTLA initiated a preboycott lobbying campaign to increase the CJA fees and paid the expenses of the campaign out of the SCTLA treasury. SCTLA officers organized the 1983 strike for higher fees, and the Association paid strike-related expenses. In general, SCTLA held itself out as the representative of CJA lawyers, and its officers were generally perceived to be authorized to speak on behalf of CJA lawyers regarding fee levels and other matters affecting CJA practice.[18]

The respondent Ralph J. Perrotta is a CJA regular, with about 90 percent of his practice consisting of CJA cases. Mr. Perrotta was elected president of SCTLA in the fall of 1982 and [8] chairman in October 1983.[19] The respondent Karen E. Koskoff, also a CJA regular, derives about 99 per cent of her practice from CJA assignments. In late 1982, Ms. Koskoff was elected vice-president of SCTLA and, in October 1983, she was elected SCTLA's president.[20] The respondent Reginald G. Addison, another CJA regular, derives about 90 per cent of his practice from CJA cases. In 1983, he was elected secretary of SCTLA and, in October 1983, he was elected SCTLA's vice-president.[21] During the period of time with which this action is concerned, the respondent Joanne D. Slaight was a CJA regular who derived 95 per cent of her practice from CJA cases. In August 1983, Ms. Slaight was named chairperson of the SCTLA "Strike Committee."[22] In December 1983, she left CJA practice for a position with a public interest research group in New York, but she has since returned to practice in the District and is again accepting cases under the CJA.[23]

Before the strike, the CJA lawyers, through the officers of SCTLA, engaged in a vigorous lobbying campaign for an increase in CJA fees.[24] This campaign, which was funded by the SCTLA [9] treasury, included meetings with the Chief Judge of the Superior Court and the court's administrative officer to seek their support for a fee increase, with the Counsel to the Mayor to discuss legislative possibilities, with the Dean of the Howard University School of Law to seek advice on

[17] I.D.F. 2.
[18] I.D.F. 4.
[19] I.D.F. 5.
[20] I.D.F. 6.
[21] I.D.F. 7.
[22] I.D.F. 8.
[23] Supplemental Filing of Respondents, August 1, 1985.
[24] I.D.F. 37–45.

how to secure passage of legislation raising the CJA fees, and with a staff member of the Subcommittee on the District of Columbia of the Senate Committee on Appropriations to explore the possibility of federal funding to increase the CJA fees.[25] The SCTLA also rallied supporters to testify before the City Council's Committee on the Judiciary in favor of pending legislation to increase the CJA fees.[26] Despite the introduction of various legislative initiatives in the City Council, SCTLA did not succeed in its lobbying efforts to obtain passage of legislation raising the CJA fees.[27] City officials in the legislative and executive branches told the CJA lawyers that no money could be found to fund the increase.[28]

In early August 1983, the SCTLA leaders told the other CJA lawyers at an SCTLA meeting that the pending legislation to increase the CJA fees was unlikely to be passed because of the lack of funding. In response, the CJA lawyers voted to form a "strike committee," later designated the "SCTLA Strike [10] Committee," to consider additional action to obtain a fee increase.[29] The members of the strike committee met shortly thereafter and agreed that the only way to obtain higher fees was for the CJA lawyers to stop accepting new CJA cases until the city complied with their demands. They also agreed that they should demand an increase to $45 per hour for out-of-court time and $55 per hour for in-court time.[30]

Ms. Slaight was designated chairperson of the strike committee, and Mr. Perrotta, Ms. Koskoff and Mr. Addison were designated as the "Negotiating Team." Other CJA lawyers were assigned responsibility for making sure that all the CJA lawyers knew about the strike, contacting other groups of lawyers and contacting the media.[31]

At an SCTLA meeting on August 11, 1983, a group of about 100 CJA lawyers agreed to strike if the CJA fees were not increased by September 6th.[32] Immediately following this meeting, a petition was drafted and posted in the lawyers' lounge. The petition stated: [11]

> We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice

[25] I.D.F. 37–40 & 44.

[26] I.D.F. 42.

[27] I.D.F. 42 & 43.

[28] I.D.F. 36, 42, 43 & 45.

[29] I.D.F. 46.

[30] Before the 1983 boycott, the District's CJA fees were set at the maximum, $20 and $30, provided in the federal Criminal Justice Act, 18 U.S.C. 3006A(d)(1)–(2). In October, 1984, one year after the boycott, the federal statute was amended to provide for fees "not exceeding" $60 per hour for in-court time and $40 per hour for out-of-court time.

[31] I.D.F. 47.

[32] I.D.F. 48.

Act.[33]

The petition was signed by a number of CJA attorneys including Mr. Addison and Ms. Slaight.

By late August, the SCTLA lawyers were working to assure the success of the strike scheduled for September 6. The SCTLA (over Mr. Perrotta's signature) sent a letter to a number of law firms in the city announcing the impending strike to increase CJA fees and asking them to "support [SCTLA's] goals by not making your firm available to accept cases during this period."[34] The SCTLA Strike Committee solicited the written commitment of other CJA lawyers to support the boycott.[35] SCTLA members also addressed several lawyers' associations, making the same request, and made additional efforts to persuade the few remaining holdouts among the CJA lawyers to join in the strike.[36]

On August 29, immediately before a press conference scheduled by SCTLA to discuss the planned strike, SCTLA representatives met with Mayor Barry to discuss their demand for an increase in the CJA fees.[37] According to Mr. Perrotta, the [12] Mayor was sympathetic to the need for an increase in the CJA fees, but he did not know where the city would find the money to fund such an increase.[38] The Mayor explained the city's legislative and budgetary process to the SCTLA representatives and said that, except in an emergency, the process can take months.[39] The SCTLA representatives told the Mayor that the SCTLA lawyers had voted to strike beginning on September 6 if the CJA fees had not been increased by that time. The Mayor responded that even if he could find the money to fund an increase, he would be unable to do so by that date.[40]

On September 6, 1983, the strike began as planned. All of the named respondents and almost all of the CJA regulars stopped calling in to place their names on the daily list of attorneys willing to accept CJA appointments.[41] The SCTLA Strike Committee also staged a series of events—rallies, picket lines, handouts of "press kits," and newspaper and television interviews—designed to inform the general public about the goals of the strike.[42]

As anticipated by the SCTLA, the strike had a severe impact on the District's criminal justice system. The city's need for legal services for

[33] CX 4B-D.
[34] CX 6A.
[35] CX 8A, CX 10A.
[36] I.D.F. 55.
[37] CX 13.
[38] Perrotta Tr. 700; I.D.F. 50.
[39] Perrotta Tr. 701.
[40] *Id.*
[41] I.D.F. 56.
[42] I.D.F. 58.

indigent criminal defendants continued during [13] the strike and the available alternatives to replace the CJA lawyers were inadequate to the need.[43] Within a few days, the Public Defender Service lawyers were swamped with cases. As many as eight or nine indigent defendants per day were assigned to PDS lawyers who already were carrying full caseloads. The few CJA regulars who continued to accept cases were also soon overloaded. The overall response of lawyers in private law firms to a call from the Public Defender Service for help was, in the words of the Administrative Law Judge, "feeble."[44]

On September 15, 1983, Messrs. Cohen and Carter of the Public Defender Service hand-delivered to Chief Judge Moultrie of the Superior Court, the Mayor, and City Councilwoman Wilhelmina Rolark a letter "to apprise [them] of the extremely serious situation that has now developed with respect to the legal representation of indigents in criminal and juvenile delinquency cases in the Superior Court of the District of Columbia" as a result of the strike by the SCTLA lawyers.[45] Messrs. Cohen and [14] Carter stated that the PDS was unable to provide the necessary quantity and quality of legal services during the strike and that the daily demand for representation had "seriously depleted" the private bar as a resource for counsel for indigent defendants. The PDS urged Councilwoman Rolark, Chief Judge Moultrie and Mayor Barry to declare their support for pending legislation to increase the CJA fees in order to alleviate the "crisis."[46] Chief Judge Moultrie also informed the Mayor that in his view the criminal justice system was approaching a crisis point.[47]

Immediately after receiving the letter from the Public Defender Service, the Mayor set up a meeting with the respondents Koskoff, Perrotta, and Addison. The purpose of the meeting was to negotiate an end to the SCTLA lawyers' strike.[48] The Mayor first proposed that he would support an increase in the CJA fees to $35 an hour for both in-court and out-of-court time, consistent with the legislation then pending, through the normal legislative process. This commitment by the Mayor to fund the increase was a commitment he had declined to

[43] I.D.F. 60. Before the strike, 35 to 40 CJA lawyers called in daily for case assignments and handled about 85% of CJA cases. After September 6, only three or four CJA lawyers called in daily, and the percentage of indigency cases handled by them dropped to about 8%. I.D.F. 60 n.187.

[44] I.D.F. 60. The PDS requested volunteers from a list of 40 law firms with "conspicuous pro bono programs." The SCTLA Strike Committee, in late August, had requested these firms to support SCTLA by refusing to accept cases during the strike. *See* text at note 34 *supra*. It is unclear from the record whether the firms' lack of response to the PDS request for assistance resulted from the SCTLA letter. I.D.F. 55 n.169.

[45] CX 31A-C.

[46] *Id.*

[47] I.D.F. 61 & 62. The Chief Judge also said that he was "unalterably opposed to a strike or an organized boycott as a method to bring about the needed changes." RX 140 (Letter to David B. Isbell, President, D.C. Bar Association (Sept. 10, 1983)).

[48] JX 11, at 45.

give at the August 29 meeting with the SCTLA leaders.[49] The SCTLA representatives [**15**] said, however, that the CJA lawyers would be unlikely to resume calling in for CJA assignments on the basis of a commitment to fund a bill that might pass three or four months later. The Mayor then agreed to support emergency legislation for the increase.[50] After the Mayor agreed to support emergency legislation to increase the CJA fees to $35 an hour and to support introduction of a second bill to increase the CJA fees to the $45 and $55 levels, the SCTLA representatives agreed to urge the CJA lawyers to resume calling in for cases.[51]

On September 16, the Mayor notified Councilwoman Rolark that he would "initiate reprogramming or supplemental actions . . . to ensure that the courts have adequate resources to cover the increased costs" of the proposed $35 CJA fee.[52] Councilwoman Rolark and Council Chairman Clarke, at a meeting with Ms. Koskoff and Mr. Addison, agreed to consider the bill to increase the CJA fees to $35 on an emergency basis. When Ms. Koskoff expressed concern that some of the striking attorneys might not accept the $35 proposal, Chairman Clarke and Councilwoman Rolark agreed to introduce a bill to increase the CJA fees to the $45/$55 levels, but only for future consideration in the normal course of legislative business.[53] [**16**]

At Ms. Koskoff's request, the councilmembers agreed to meet with those CJA attorneys who were demanding the higher rate. Chairman Clarke told the lawyers that the increase to $35 an hour was the only increase that the Council would consider on an emergency basis and that the Council would not consider any increase if the CJA lawyers rejected the offer. He also said that the CJA lawyers must tell him by 1:00 p.m. on September 19 whether they would accept the proposed $35 increase.[54]

On September 19, 1983, the SCTLA membership voted to accept the $35 offer and end their boycott.[55] Later the same day, the City Council's judiciary committee met and reported out the emergency legislation.[56] On September 20, Chairman Clarke suspended the rules for consideration of the proposed increase on an emergency basis, and the increase was approved unanimously by the City Council.[57] On September 21, 1983, the CJA regulars resumed calling the CJA office to

[49] JX 12, at 67 & 97; *see* text at notes 38 & 40 *supra.*
[50] JX 11, at 48.
[51] *Id.*
[52] I.D.F. 64.
[53] I.D.F. 65.
[54] *Id.*
[55] I.D.F. 66.
[56] I.D.F..67.
[57] I.D.F. 68.

accept new cases.[58] [17]

LEGAL ANALYSIS

I. The Boycott

On September 6, 1983, the officers of SCTLA and other CJA lawyers jointly refused to accept new CJA appointments, until the District of Columbia increased the CJA fees.[59] Their strike was successful. The city's CJA program for providing counsel to indigents approached the "brink of collapse,"[60] and the city responded to the emergency by offering to increase the CJA fees if the respondents would end the strike. On September 19, the SCTLA lawyers voted to accept the city's proposed fee increase,[61] and they resumed accepting new CJA assignments on September 21.[62] The question before us is whether the respondents' joint and coercive refusal to deal with the city until the city raised the price for their services constitutes unlawful conduct under section 5 of the FTC Act.[63] We conclude that it does. [18]

A.

We find that the city's purchase of CJA legal services for indigents is based on competition.[64] The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition.[65] Indeed, an acknowledgement of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was "necessary to attract, and retain, competent lawyers."[66] If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and [19] quality of legal ser-

[58] I.D.F. 69.

[59] I.D.F. 48–49. Mr. Perrotta and Ms. Koskoff did not sign the petition or vote for the strike, I.D.F. 49 & note 153, but both participated in the boycott. I.D.F. 56.

[60] I.D.F. 61.

[61] I.D.F. 66.

[62] I.D.F. 69.

[63] The "[u]nfair methods of competition" proscribed by section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), include restraints of trade violative of the Sherman Act, 15 U.S.C. 1. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948).

[64] Accordingly, we reject the respondents' contention that antitrust analysis is inappropriate because the purchase of CJA services by the city does not involve competition. R.A.B. at 41–42.

[65] Counsel for the respondents acknowledged at oral argument that the preboycott CJA fees were the market (*i.e.*, the competitive) price. Transcript, Oral Argument, Feb. 7, 1985, at 52.

[66] R.A.B. at 9. The respondents suggest that a "benefit" of their boycott was an increase in the number of lawyers willing to take CJA cases. R.A.B. at 23. The Supreme Court has rejected this argument. *See* note 81 *infra*.

vices that it needed.[67]

The lawyers who provide legal services to the city under the CJA program are competitors, individual entrepreneurs, selling their services to the District of Columbia. Each lawyer who is eligible for the CJA program is free to determine, on a daily basis, whether to accept CJA assignments at the city's offering price or to seek clients elsewhere. In making the decision whether to accept CJA assignments, the individual lawyer may consider not only the price offered by the city for CJA services but also the prices offered by other potential clients or employers.[68] The supply of lawyers to the city's CJA program depends upon these independent decisions of numerous individuals.

The number of CJA assignments available to each lawyer and, hence, his income from the CJA program, depend upon the number of indigent criminal defendants who require CJA counsel and the number of other lawyers who make themselves available for such cases, as well as the lawyer's own availability for the assignments. This competition does not differ from that confronting any lawyer—or indeed from that confronting an accountant, a plumber or any other seller of services—whose work load and income depend upon his availability, the [**20**] availability of competing providers, the demand for the service and the fee for the service.

The lawyers who sold their services to the CJA program did not and could not negotiate their fees on an individual basis because the city established one fee for all, regardless of their experience or other qualifications. Individually negotiated prices, however, are not a prerequisite for competition. In most markets, either the seller or the buyer posts a price. In many indisputably competitive product markets, such as the wholesale crude oil, grain and other commodity markets, a buyer unilaterally posts an offering price and potential sellers vie with one another to determine whether they will sell at the offering price or hold out for a higher price. The challenge facing the city is the same as that facing many buyers: to announce a price sufficient to obtain the desired quantity and quality of services without paying more than the market requires. This type of pricing arrangement differs only superficially from the more usual arrangement in which offering prices are posted by the sellers. Under either price arrangement, sellers who agree among themselves to restrict supply in order to raise prices are acting in concert to force the buyer to pay a higher price. [**21**]

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[67] Counsel for the respondents admitted at oral argument that CJA representation before the boycott satisfied minimum constitutional standards. Transcript, Oral Argument, Feb. 7, 1985, at 53. *See also* I.D.F. 25 & note 91.

[68] The respondents also acknowledge this competition with their statement that many lawyers move from CJA practice "to a more lucrative practice as soon as they have the opportunity to do so." R.A.B. at 8.

B.

In deciding whether the respondents have unlawfully restrained competition in the market for CJA services, we first must determine whether to use a *per se* or rule of reason analysis. The choice between the two approaches depends upon "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19–20 (1979).

The *per se* rule applies to facially anticompetitive agreements, "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' " *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). The rule of reason applies to agreements the competitive effects of which can be evaluated only by analyzing the facts peculiar to the business and the purpose and effect of the restraint. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Whichever analysis applies, the purpose is to determine whether the conduct under scrutiny unreasonably restrains competition, and "the inquiry is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers v. United States*, 435 U.S. at 690. [22]

We conclude, as discussed below, that the respondents' concerted refusal to deal for the purpose of raising the fees paid to them under the CJA program is unlawful and that application of the *per se* standard is appropriate on the facts of this case. We would reach the same conclusion under a rule of reason analysis.

1. *Per se* Analysis

The basic facts are not in dispute. The respondents collectively refused to accept new CJA assignments until the city increased the CJA fees. The purpose of the boycott was to increase fees. The Administrative Law Judge found, and we agree, that the respondents' boycott succeeded in forcing the city to increase the CJA fees.[69] Such concerted action to raise prices has consistently been held unlawful by the courts. "Price is the 'central nervous system of the economy,' *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59, and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. at 692.

The respondents' boycott to raise prices directly and immediately

[69] I.D.F. 61 & 70.

eliminated virtually all competition among the participating lawyers for CJA appointments at the city's offering price and dramatically reduced the supply of lawyers to the CJA [23] program. The city's ability to fulfill its constitutional obligation to supply counsel for criminal indigent defendants was severely strained, and some city officials feared a "crisis point"[70] in the CJA system. The crisis was resolved when the city capitulated to the respondents' demands and increased the CJA fees. On its face, the boycott to raise prices unreasonably restrained trade within the meaning of section 1 of the Sherman Act and section 5 of the FTC Act, and application of the *per se* rule appears to be appropriate. *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 342–55 (1982); *National Society of Professional Engineers v. United States,* 435 U.S. at 692–93.

The respondents contend that a *per se* analysis of their conduct is inappropriate because any agreement among them "that could conceivably be called price-fixing as distinct from a boycott would be protected under *Noerr-Pennington.*"[71] We need not and do not address the question of the lawfulness of any agreement on price "as distinct from a boycott." We consider only the lawfulness of the respondents' coercive, concerted refusal to deal for the purpose of increasing the CJA fees, and our conclusion that the respondents have violated the law is based on that conduct, not upon their price agreement alone nor upon their preboycott collective efforts to persuade the city government, solely by the force of argument, to raise the fees. [24]

The respondents' assertion that their boycott "is not of the type which has been held to be *per se* unlawful, *i.e.,* concerted group action to injure or eliminate a competitor of one or more of the participants,"[72] does not change our analysis. If the boycott had not had the purpose and effect of raising prices, then a more elaborate analysis might be required. Here, however, the boycott was a single course of action, a coercive, concerted refusal to deal, with a single purpose—to increase the fees paid to the boycott participants in their capacity as CJA lawyers. "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' " *NCAA v. Board of Regents,* 468 U.S. 85, 109 (1984), *citing National Society of Professional Engineers v. United States,* 435 U.S. at 692; *see also San Juan Racing Association, Inc. v. Asociacion de Jinetes de Puerto Rico, Inc.,* 590 F.2d 31 (1st Cir. 1979).

The conduct of the CJA lawyers in pressuring the city to increase

[70] I.D.F. 61.
[71] R.A.B. at 49.
[72] R.A.B. at 49.

the CJA fees clearly falls within the "generic concept of 'boycott.' " *St. Paul Fire & Marine Insurance Co. v. Barry,* 438 U.S. 531, 541 (1978). Because it was aimed at their customer, the respondents' boycott was different from those boycotts in which the target is a competing firm and the purpose is to drive the target from the market or to impede its ability **[25]** to compete.[73] Whether a concerted refusal to deal is aimed at a customer or at a competitor, however, the question remains the same: "whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. United States,* 435 U.S. at 691; *accord, Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 105 S.Ct. at 2620. Applying this standard to the facts before us, we conclude that application of the *per se* rule to the respondents' coercive boycott to raise prices is appropriate.

The respondents argue that they lacked the ability to set the price for CJA services,[74] because formal legislative action by the city was necessary to increase the fees, and that their conduct "is more accurately described as a horizontal price-*related* restraint"[75] than as horizontal price fixing. This does not exonerate the participants in the boycott, because the evidence shows that they coerced the city to increase the CJA fees. Indeed, the record shows that the City Council sought the **[26]** SCTLA lawyers' approval of a proposed legislative increase before the Council would act.[76]

The respondents also claim that the public service aspect of their practice of law makes the *per se* rule inapplicable, under the authority of *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), at least when the conduct involved is not direct price fixing.[77] We have concluded, however, that the SCTLA lawyers' concerted refusal to deal for the purpose and with the effect of raising prices is price fixing and is therefore subject to the *per se* rule. In *Goldfarb,* the Court applied the *per se* rule to price fixing by lawyers for title examinations: "Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word." *Id.* at 787–88. We discern no reason for applying a different rule here. A lawyer who provides legal representation for an indigent defendant also provides a service, and the exchange of this service for money is also commerce. The respondents,

[73] Sometimes a showing of "market power or exclusive access to an element essential to effective competition" is necessary in a case involving a refusal to deal. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 105 S.Ct. 2613, 2621 (1985). Proof of market power is not required here, because, "[a]s a matter of law, the absence of proof of market power does not justify a naked restraint on price or output." *NCAA v. Board of Regents,* 468 U.S. at 109, *citing United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940).

[74] R.A.B. at 48.

[75] R.A.B. at 50.

[76] I.D.F. 65–66.

[77] R.A.B. at 48.

like the lawyers in *Goldfarb,* refused to provide legal services unless their price demands were met.

The respondents also contend that a *per se* analysis is inappropriate because "the political dimensions of this case . . . ensure that the usual presumptions about conduct drawn [27] from the economic sphere simply do not apply."[78] As we discussed earlier, in determining that competition exists in the market for CJA services, principles of economics do apply to the purchase and sale of legal services for indigent criminal defendants. Those principles do not vary depending upon the identity of the sellers or of the purchaser of the service. The fact that the purchaser is a city government and the fact that the sellers are lawyers who provide a service that benefits the public have no economic significance that affects the performance of the market. The extent to which the identity of the market participants may or may not have legal significance is addressed in Part II of this opinion. None of the "political dimensions" to which the respondents allude alters the nature of their coercive boycott to increase prices, conduct with which the courts and the Commission are familiar. The boycott immediately restricted supply at the existing price and resulted in increased prices. "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *NCAA v. Board of Regents,* 468 U.S. at 107–08.

2. Rule of Reason Analysis

We conclude that the respondents' boycott would also be unlawful under a rule of reason analysis. On its face, the [28] boycott was a naked restraint on price and output.[79] The question under the rule of reason, then, is whether the respondents have established any countervailing competitive justifications for the restraint. *FTC v. Indiana Federation of Dentists,* No. 84–1809, slip op. at 11–12 (U.S. June 2, 1986); *NCAA v. Board of Regents,* 468 U.S. at 113. It is important to note that the respondents do not claim that their boycott was "designed to 'increase economic efficiency and render markets more rather than less competitive.' " *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. at 20. The boycott created no new product, as in *Broadcast Music,* nor did it accompany any legitimate joint endeavor that might "increase sellers' aggregate output and thus be procompetitive." *NCAA v. Board of Regents,* 468 U.S. at 103; *see also Arizona v. Maricopa County Medical Society,* 457 U.S. at 356–57; R. Bork, *The Antitrust Paradox* 332–34 (1978).

The respondents argue in defense that the boycott was justified

[78] R.A.B. at 48.

[79] Although we agree with the finding of the Administrative Law Judge that the respondents had market power, *i.e.,* the ability to raise price above the competitive level, *NCAA v. Board of Regents,* 468 U.S. at 109; no showing of market power is necessary. *See* text at note 69 & note 73 *supra.*

because of their concerns with the quality of legal services provided to indigents.[80] They suggest that the increase in CJA fees will improve the quality of legal services because individual lawyers will be able (without financial loss) to take fewer CJA cases and to devote more time to each [**29**] one.[81] These asserted benefits do not amount to procompetitive efficiencies that can be achieved only by joint action.[82] The quantity and quality of legal services provided by each lawyer to the CJA program necessarily depend upon his or her individual commitment of resources and ability.[83] There is no question here involving "[e]thical norms [that] may serve to regulate and promote this competition, and thus fall within the Rule of Reason," *National Society of Professional Engineers v. United States,* 435 U.S. at 696, nor is there any "product" whose "integrity . . . cannot be preserved except by mutual agreement." *NCAA v. Board of Regents,* 468 U.S. at 102; *see* [**30**] *also United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 279–81 (6th Cir. 1898), *aff'd as modified,* 175 U.S. 211 (1899).

The argument that higher CJA fees would result in higher quality legal services is not an argument that the boycott promoted competition. Rather, it is an argument that the respondents should be permitted to replace the competitive price with their preferred price. The respondents seek to impose their "views of the costs and benefits of competition on the entire marketplace." *National Society of Professional Engineers v. United States,* 435 U.S. at 695; *see also FTC v. Indiana Federation of Dentists,* slip op. at 14.

This argument, that the adverse effects of competition on the quality of services justifies price fixing, was squarely rejected by the Supreme Court in *National Society of Professional Engineers v. United States,* 435 U.S. at 695:

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the

[80] R.A.B. at 45–47.

[81] They also suggest that increased fees will attract more lawyers to enter and to remain in CJA practice. R.A.B. at 23. This is the likely effect of any cartel price and was rejected as a defense to horizontal restraints on price or output in *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 649 (1980):

> [I]n any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors . . . , it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

[82] Less restrictive alternatives for ensuring the quality of legal services may be available. *See, e.g.,* Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role,* 93 Harv. L. Rev. 633 (1980).

[83] Incompetent lawyers would not be deterred by supracompetitive prices. The Administrative Law Judge concluded that the fee increase was unlikely significantly to improve the overall quality of indigency representation. I.D.F. 72.

immediate cost, are favorably affected by the free opportunity to select among alternative offers.

Each of the respondents was free individually to decide that he or she could not provide adequate legal services at the price the city was offering under the CJA program and to seek other clients, but their collective agreement to withhold their services until a price increase was enacted is unlawful. "[T]he Rule of Reason does not support a defense based on the assumption [**31**] that competition itself is unreasonable." *Id.* at 696; *accord, NCAA v. Board of Regents,* 468 U.S. at 117; *see also FTC v. Indiana Federation of Dentists,* slip op. at 15.

In the usual case involving conduct that is a naked restraint of trade for which no competitive justification exists, it is unnecessary to examine anticompetitive effects. *See Arizona v. Maricopa County Medical Society,* 457 U.S. at 355–57; *National Society of Professional Engineers v. United States,* 435 U.S. at 692. In this case, however, the Administrative Law Judge dismissed the complaint on the ground that there were "no adverse effects in the special circumstances of the 1983 boycott," because the city was "supportive of the boycotters' demands."[84] We disagree, and we find that the boycott did result in anticompetitive effects.

First, the SCTLA lawyers, acting in concert, directly and immediately restrained competition among themselves. They explicitly agreed that they would not provide legal services to the city until their price demands were met. This concerted refusal to deal eliminated competition among the SCTLA lawyers. The boycott dramatically reduced the supply of lawyers to the city's CJA program and adversely affected the city's ability to meet its constitutional obligation to provide counsel for indigent defendants. The city capitulated to the respondents' demands. The boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an [**32**] adequate supply of CJA lawyers to a level satisfactory to the respondents. The city must, as a result of the boycott, spend an additional $4 million to $5 million a year to obtain legal services for indigents.[85] We find that these are substantial anticompetitive effects resulting from the respondents' conduct.

The Administrative Law Judge also concluded that "the boycott was viewed by city officials as the only feasible way of getting a rate increase,"[86] that the city was "supportive of the boycotters' demands,"[87] and that the respondents' conduct was "accompanied by

[84] I.D., slip op. at 93.

[85] I.D.F. 71.

[86] I.D., slip op. at 96.

[87] I.D., slip op. at 93. Judge Needelman elsewhere describes the city's role as "ambivalent." I.D., slip op. at 92 n.222.

the buyer's knowing wink."[88] We find that the record does not support these conclusions.

The record shows that the District government increased the fees for lawyers under its CJA program only when it was coerced by the respondents to do so.[89] Although Chief Judge Moultrie of the District of Columbia Superior Court, the Mayor, and some members of the City Council and of the Mayor's staff expressed sympathy with the respondents' desire for increased CJA fees, the city declined in 1982 and in 1983 before the boycott to enact an increase because of budgetary constraints.[90] When the boycott [33] was put into effect, the city government responded to deal with the "crisis,"[91] to reestablish the CJA program as quickly as possible. Although the Chief Judge supported a fee increase to end the boycott, he expressly disapproved the respondents' boycott tactics.[92] In order to end the boycott, the Mayor proposed and the City Council enacted emergency legislation. The record shows a direct causal link between the respondents' coercive boycott and the city government's capitulation to their demands. Indeed, the City Council sought the respondents' approval of the proposed legislative increase in fees before it would act.[93] We find nothing in these events to support the Administrative Law Judge's conclusion that the city supported the boycott.

Even if proved, the acquiescence or support of some members of the city government would not immunize the respondents' boycott to increase prices from the antitrust laws. This defense was considered and rejected in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 226, where the Supreme Court said: "Though employees of the government may have known of those [price stabilization] programs and winked at them or tacitly approved them, no immunity would thereby have been obtained." The Court reasoned that if such a "knowing wink" defense to the antitrust laws were permitted, national competition policy would be [34] determined "not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers."[94] Accordingly, we reject the so-called "knowing wink" defense on both the facts and the law.

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[88] *Id.* at 93.

[89] *See* I.D.F. 61 & 70.

[90] I.D.F. 36, 37 n.127 & 42–43.

[91] Carter Tr. 104–05.

[92] I.D.F. 62 & note 192.

[93] I.D.F. 65–66.

[94] 310 U.S. at 227. *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 95 (1977).

C.

Finally, the respondents argue that, for various reasons unique to this market, antitrust analysis is simply inappropriate in this case. We have already addressed and refuted their principal argument that competition does not exist in the market for CJA services. After considering the respondents' other reasons for questioning the applicability of the antitrust laws to their conduct, we conclude that it is appropriate to apply the antitrust laws in this case.

According to the respondents, the economic principles underlying the antitrust laws do not apply to the purchase and sale of CJA services, because "it is in the [District] government's interest from an economic standpoint to provide the poorest possible quality of [CJA] services."[95] Their [35] explanation for this provocative assertion is that if the city buys better quality legal services for indigent criminal defendants, its "opponents in court," then the city will also have to pay more for better prosecutors and additional court staff.[96] We disagree with their assessment of the city's economic interest.

One of the District's functions as a unit of government is to provide a system for the administration of justice consistent with our national commitment to substantive and procedural fairness. The provision of effective counsel to indigent criminal defendants is an essential part of such a system. In addition to its inherent governmental interest in seeing justice accomplished, the city, as the respondents correctly note, is also required by law to provide effective counsel to indigent defendants. We have no reason to doubt that the city government is philosophically as well as legally committed to providing effective counsel for indigent criminal defendants.

We also have no reason to doubt that the District has an interest in the efficiency of its judicial system. But it simply does not follow that the city affirmatively prefers to offer the "poorest possible quality of services." Indeed, the efficiency of our adversarial system of justice is undoubtedly affected adversely when one of the parties is inadequately represented, and the cost of providing poor quality legal representation, which may result in appeals on the ground of inadequate counsel [36] and in reversals, could be high. We conclude that the city's economic interest is in obtaining a quality of service sufficient for its needs at the lowest price. We reject as a matter of economic theory the notion that the District government affirmatively preferred lower quality CJA representation, and we find that the record evidence does not support such a preference as a matter of fact.

The respondents also suggest that antitrust analysis is inappropri-

[95] R.A.B. at 43.
[96] R.A.B. at 42 (emphasis omitted).

ate in this case, because the application of antitrust principles somehow threatens to drive the quality of CJA legal representation below an acceptable level. Their theory is that to apply the antitrust laws here might "endanger the Sixth Amendment right to effective counsel,"[97] because "*effective* assistance of counsel . . . necessarily requires a level of compensation sufficient to produce this result, regardless of whatever [price] level antitrust and economic analysis would determine to be optimal or even adequate."[98] This is the economic version of the legal argument we rejected earlier, when we concluded that an interest in providing higher quality service does not provide sufficient justification, under a rule of reason analysis, to excuse the respondents' conduct.

The respondents are saying that in this market, as opposed to all other markets, a price higher than the competitive price is necessary to ensure the requisite quality of services. We [37] disagree. As the Supreme Court has recognized, the economic theory underlying the antitrust laws is that competition will result in an optimal price-quality mix for goods and services. Recently, in *NCAA v. Board of Regents,* 468 U.S. at 104 n.27, the Court said:

> The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. . . . *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 4–5 (1958).

Accord, National Society of Professional Engineers v. United States, 435 U.S. at 695.

The respondents' argument also ignores substantial judicial precedent that "foreclose[s] the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers v. United States,* 435 U.S. at 689 (citations omitted); *accord, Arizona v. Maricopa County Medical Society,* 457 U.S. at 349–55 & 350 n.22; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. at 221–22; *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897). A similar argument was made in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), where the Court concluded that the public service aspect of the practice of law does not provide an exemption from the Sherman Act. Although the [38] Court noted that "[t]he fact that a restraint operates upon a profession as

[97] R.A.B. at 43.

[98] *Id.*

distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act," *id.* at 788 n.17, the Court rejected the notion that the antitrust laws should not apply in the first place.

As the Court noted in *Professional Engineers,* competition may force prices down and an inexpensive service may be inferior to one that is more costly. 435 U.S. at 694. Based on these considerations, the city might determine that its interest in quality can be satisfied at a lower price, or an individual lawyer might independently determine that he or she cannot provide adequate services at the price offered by the city. We see no reason to suppose, however, that the District would ever purchase services inadequate to meet its obligations under the law. Application of the antitrust laws does not change the fact that a manufacturer of complex equipment will not buy component parts that do not meet its product specifications. The same is true here. Regardless of whether we apply the antitrust laws in this case, the District will not purchase less than effective counsel, because that would not satisfy its requirements. In purchasing legal representation for indigent criminal defendants, presumably the District will seek the best price for the quality of representation it requires. To ensure a competitive market, application of the antitrust laws is entirely appropriate. **[39]**

Finally, we reject the argument that the "political dimension" of this case makes antitrust analysis inapposite. The respondents claim that because the CJA program is legislatively created to comply with constitutional obligations, "there can be no presumption that an increase in price is due to cartelization and a restriction of output, rather than to political action that has shifted out the demand curve,"[99] and that "the straightforward inferences that can be drawn in normal economic markets about which actions are coercive and which are not are simply not available."[100] Our conclusions in this case are not based on presumptions and inferences, but rather on specific findings that the SCTLA lawyers' boycott restrained competition and forced the city to act to increase prices. To the extent that the respondents' arguments imply that competition does not exist in the market for CJA services, we reject them for the reasons discussed above. To the extent that these arguments imply that a political dimension negates the evidentiary findings of cause and effect in this case,[101] we reject them as against the weight of the evidence. **[40]**

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[99] R.A.B. at 44.

[100] *Id.*

[101] *See* I.D.F. 70.

II. Immunity Under the First Amendment

The respondents assert that their conduct constituted political activity to influence legislation that is protected by the First Amendment from scrutiny under the antitrust laws. This defense often arises in antitrust cases where, as here, the conduct at issue involves efforts to obtain governmental action. In antitrust cases, the defense usually arises under the *Noerr-Pennington* doctrine,[102] which is generally understood to immunize from the antitrust laws political activity, undertaken for anticompetitive purposes, to influence public officials to take action that would produce anticompetitive effects.

The First Amendment right to petition also has been asserted as a defense in cases involving boycotts undertaken to further goals extrinsic to the competitive process, where the boycott is not particularly directed to influencing competition in a product market or relevant line of commerce. These cases, involving consumer boycotts organized to promote various social, religious or political goals, we will call, for ease of reference, the political boycott cases. Either line of authority, if it applies, could immunize from liability those who participated in the boycott of the District of Columbia's CJA program.[41]

The political boycott cases involve conduct that was initiated by consumers for the purpose of influencing governmental policy-making to further social and political goals. The respondents claim that their conduct is entitled to immunity under the political boycott cases, because their purpose was "to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights."[103] We disagree. Unlike the political boycott cases, the boycott of the CJA program was agreed upon among competitors and was designed to restrain competition for their direct economic benefit. The members of SCTLA explicitly sought to force concessions from the District government in its role as a buyer of services rather than its role as a policy maker. Because the boycott of the CJA program was undertaken to improve the economic well-being of the participants as competitors in the market for CJA services, the political boycott cases do not apply and we must examine the conduct under the antitrust laws and address the applicability of the *Noerr-Pennington* doctrine.

The First Amendment, as applied to antitrust cases through the *Noerr-Pennington* doctrine, protects a variety of petitioning conduct undertaken for anticompetitive purposes to produce anticompetitive effects through governmental action. The case before us, however, involves a coercive boycott rather than the kind of petitioning activity protected in *Noerr*. This kind of coercive conduct does not warrant

[102] *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[103] R.A.B. at 30.

immunity from the antitrust [42] laws. Second, this is not an appropriate case in which to invoke the protections of *Noerr-Pennington,* because the anticompetitive effects of the respondents' conduct were brought about not by the governmental action to which the conduct was addressed, but rather resulted directly from the respondents' conduct. A fundamental principle underlying all the cases in the *Noerr-Pennington* line of authority is that immunity from the antitrust laws is contingent on the fact that the restraint of trade in question has been brought about by government rather than private action. Here the joint action of private individuals generated the restraint and the government was simply a customer who, like any other customer, had a valid interest in obtaining a competitive price. As explained more fully below, we find no immunity for the respondents under the cases dealing with efforts to influence governmental action.

A. *Political Boycotts*

Those who have engaged in political boycotts have invoked the First Amendment to protect themselves from various legal sanctions. *E.g., NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982); *Missouri v. National Organization for Women, Inc.,* 620 [43] F.2d 1301 (8th Cir.), *cert. denied,* 449 U.S. 842 (1980).[104] In *Claiborne Hardware,* the Court held that the nonviolent elements of an NAACP-inspired boycott of white merchants "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself" were entitled to First Amendment protection. 458 U.S. at 914. The Court said that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." *Id.* at 913. Similarly, in the *NOW* case, the court held that NOW's boycott of convention facilities in states that had not ratified the Equal Rights Amendment was privileged activity protected from state tort law claims under the First Amendment. 620 F.2d at 1317–19.[105] In addressing the antitrust count, the court reviewed the legislative history of the Sherman Act and concluded that the Act does not prohibit "a boycott in a noncompetitive political arena for the purpose of influencing legislation." *Id.* at 1315. [44]

The respondents seek to characterize their boycott as a political boycott and, therefore, protected speech under the First Amendment

[104] Although they have included counts under state and federal antitrust law, the political boycott cases basically sound in tort. In *Claiborne Hardware,* for example, the Mississippi Supreme Court affirmed liability on the common law tort theory but dismissed the state antitrust claim. The Supreme Court, noting that no antitrust questions were before it for consideration, 458 U.S. at 915 n.49, addressed only the propriety of the common law tort holding under the First Amendment.

[105] This holding was cited with approval in *Claiborne Hardware,* 458 U.S. at 914 n.48.

within the meaning of *Claiborne Hardware* and *NOW*. They say that the "essence" of their argument is that the protection given to speech under the First Amendment should be extended to conduct "at least when undertaken for the *purpose* of securing Constitutional rights"[106] and that "a principal purpose [of] such 'speech' was to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights."[107] The legislation that the respondents sought was an increase in the fees paid to them under the city's CJA program. Because there is no constitutional right, presumably, to be paid $35 or $45 an hour, the respondents' argument depends upon the factual assumption that the purpose of their boycott was, as asserted, "to obtain more effective counsel for indigent criminal defendants in furtherance of their Sixth Amendment rights." Although we have no reason to doubt that the respondents are indeed concerned about Sixth Amendment rights, we find, as discussed below, that the purpose and effect of their conduct was commercial, not political, as evidenced by the facts that they were competitors and that their primary object was to promote their own economic well-being. Accordingly, their conduct is not immune from the antitrust laws under *Claiborne Hardware* and *NOW*. [45]

The participants in the *Claiborne Hardware* and *NOW* boycotts were plainly motivated by social concerns, and both courts considered the purpose of the boycott in holding that the conduct was protected. The boycotters were consumers who brought economic pressure to bear by their collective purchasing decisions and who were motivated by noncommercial concerns.[108] In *Claiborne Hardware*, the purpose of the boycott was "to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice." 458 U.S. at 907. Although the boycott directly affected the white merchants' businesses, the boycotters were not in competition with the white merchants and did not by their conduct seek to further their own competitive position. *Id.* at 915.[109] Similarly, in *NOW*, the purpose of the boycott was to bring economic pressure to bear on the states that had not ratified the Equal Rights Amendment. The members of NOW who instigated the [46] boycott were not in competition

[106] R.A.B. at 37 & 35–40, generally.

[107] R.A.B. at 30.

[108] As used here, a group's purpose is "commercial" or "economic" if the group is made up of competitors and the objective is profit. A noncommercial boycott is motivated by political, social, religious or other noncompetitive purpose, and the members of the group lack a significant business interest in the goal of the boycott. *See* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals To Deal*, 1970 Duke L.J. 247, 248–50 (1970); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705, 712–13 (1962); Note, *Protest Boycotts Under the Sherman Act*, 128 U. Pa. L. Rev. 1131, 1133 (1980).

[109] The boycotters shared an interest in the well-being, economic or otherwise, of blacks generally, just as the boycotters in *NOW* sought equal rights for women. This general interest in the well-being of the group, however, is different from the immediate financial or commercial interest of a business or provider of services in the competitive state of the market in which it competes. *See* Coons, *supra* note 108, at 712–13.

with one another or with the targets of the boycott, and they were not motivated by their own commercial interests. 620 F.2d at 1311–12.[110]

In *Claiborne Hardware,* the "purpose" of the boycott "was not to destroy legitimate competition" but rather "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The Court quoted with approval Judge Ainsworth's distinction between, on the one hand, boycotts by those who "were in competition" with merchants who would be injured, boycotts that arise "from parochial economic interests" and boycotts "organized for economic ends," and, on the other hand, boycotts "to protest racial discrimination," which constitute "essential political speech lying at the core of the First Amendment." *Id.* at 914–15, *quoting Henry v. First National Bank of Clarksdale,* 595 F.2d at 303.

In *NOW,* the court made the same distinction between boycotts intended to affect competition and boycotts intended to promote other interests:

> In the instant case, an infringement upon the people's right to petition the government by a boycott should also not be lightly attributed to Congress. We perceive a more accurate phrasing of Congress' concern to be [47] not the elimination of boycotts, but elimination of *boycotts used by a competitor against a competitor (or against a supplier, customer, etc.)* in the business of competing.

620 F.2d at 1310 (emphasis added). The "orientation" of NOW in organizing the boycott on behalf of the ERA was "not one of profit motivation." *Id.* at 1312. The "crux of the issue," according to the court, was "that NOW was politically motivated to use a boycott to influence ratification of the ERA." *Id.* at 1314. The court clearly distinguished between politically motivated boycotts and anticompetitive boycotts cognizable under the antitrust laws.

As the respondents note, Justice O'Connor addressed the significance of purpose in her concurring opinion in a case involving First Amendment claims of freedom of association. *Roberts v. United States Jaycees,* 468 U.S. 609, 631 (1984). She said that in determining whether an association is "primarily engaged in protected expression," the "purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant . . . ." As examples, she stated that "[l]awyering to advance social goals may be speech" while "ordinary commercial law practice is not," and that a boycott "for political

[110] In *Claiborne Hardware,* as in *NOW,* the noncompetitive context of the boycott was important in distinguishing political from antitrust boycotts. 458 U.S. at 915. *See also Henry v. First National Bank of Clarksdale,* 595 F.2d 291, 303–04 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980) (upholding federal district court injunction against execution of state court judgment in *Claiborne Hardware, Inc. v. NAACP,* No. 78,353 (Miss. Ch. Ct. Aug. 9, 1976)).

purposes" may be speech, whereas one "for purposes of maintaining a cartel is not." *Id.* at 636.

Because these cases focus on the purpose of the conduct, we turn now to an examination of the respondents' purpose for boycotting the CJA program. Although the participants in a boycott may have both political and economic interests in the [48] results they seek to achieve, the question we must consider is which of their concerns provided the incentive that caused them to act.[111] Although we do not question the respondents' genuine concern for their clients, we find unpersuasive the respondents' argument that they undertook their coercive course of conduct for altruistic rather than for commercial purposes. We find instead that the respondents' purpose in conducting the boycott was to improve their own economic well-being. Unlike the situations in *Claiborne Hardware* and *NOW,* where the objective of the participants in the boycott was independent of the economic harm the boycott imposed, here the objective is precisely that harm—to reduce output and raise prices.

The SCTLA petition announcing the boycott plainly reflected and only reflected the respondents' economic purpose: "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act."[112] Unlike the boycotts in *Claiborne Hardware* and *NOW,* this boycott took place in a competitive commercial context. The goal of the participants in this boycott was directly related to their own economic self-interest in the level of fees paid to them. The individual CJA lawyers were in competition with one another for appointments to represent criminal indigent defendants under the city's CJA program. The target of the [49] boycott, the city, was a purchaser of their services. The Administrative Law Judge found, and we agree, that the "immediate goal" of the respondents' boycott was to increase the fees paid to them as CJA lawyers.[113]

Usually our inquiry under the political boycott cases need go no further. Where, as here, a group of competitors acts in concert with the purpose and effect of forcing their customer to pay a higher price for their services, the mere assertion or even the existence of an additional, social concern does not transform their anticompetitive conduct into conduct entitled to immunity from the antitrust laws under the political boycott cases. Rather, as the Court said in *Claiborne Hardware,* "even though [governmental] regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be cur-

[111] *See* Kennedy, *Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests,* 55 S. Cal. L. Rev. 983, 989–91 (1982).

[112] CX 4B–D.

[113] I.D.F. 57.

tailed." 458 U.S. at 912. In these circumstances, the usual rule of antitrust cases, that good intentions will not protect otherwise unlawful conduct, applies. *See, e.g., National Society of Professional Engineers v. United States,* 435 U.S. at 688–90; *Chicago Board of Trade v. United States,* 246 U.S. at 238.

In this case, however, we go on to consider the conclusion of the Administrative Law Judge that the boycott was not unlawful, because an increase in the CJA fees was necessary to "satisfy the 'political' (*i.e.,* constitutional) requirement of [**50**] effective representation."[114] As discussed above, the law rejects the motion that restraints on competition can be justified by a purpose to establish, for example, a "reasonable" price, and the asserted need for an increase in the CJA fees is irrelevant to antitrust liability. Even assuming the relevance of any need for higher fees, however, we find that the evidence does not support the Administrative Law Judge's conclusion.

The Administrative Law Judge's conclusion and the respondents' assertion that "the boycott was undertaken primarily[115] to effect the Sixth Amendment right to counsel"[116] suggest that the Sixth Amendment rights of indigent criminal defendants were in jeopardy. Yet the record shows that the quality of representation provided by CJA lawyers before the boycott was adequate under Sixth Amendment standards.[117] If the city's fees for CJA lawyers had been inadequate to elicit competent counsel for indigents, a history of reversals of criminal convictions on Sixth Amendment grounds would have signalled that inadequacy. In fact, such reversals were [**51**] exceedingly rare.[118] Counsel for the respondents acknowledged in oral argument that the quality of representation under the CJA program was sufficiently competent to meet the constitutional standard.[119] The asserted constitutional concern with the quality of representation for indigents is simply not supported by a record of failure by CJA lawyers to meet constitutional standards of representation at the pre-boycott fees.

According to the respondents, if the fees paid to them as CJA lawyers were increased, they would be able to devote more hours to fewer cases, thereby provide better representation and still end up with an adequate annual income.[120] It may well be true, as the Administrative

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[114] I.D., slip op. at 94.

[115] Even the respondents do not assert that their *only* motive was to promote the interests of indigent criminal defendants.

[116] R.A.B. at 31.

[117] I.D.F. 25. The Administrative Law Judge also found that the consensus was that the pre-boycott quality of representation had improved markedly. *Id.*

[118] In the three and one-half years preceding the SCTLA boycott, only one or two cases were reversed on Sixth Amendment grounds. CX 38K (Followup Hearings on District of Columbia Appropriations for Fiscal Year 1984: Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 242 (September 27, 1983) (statement of Ralph Perrotta, president, SCTLA)).

[119] Transcript, Oral Argument, Feb. 7, 1985, at 53.

[120] Perrotta Tr. 726–28; Koskoff Tr. 834; Addison Tr. 886–88.

Law Judge found, that the respondents believed that the level of CJA fees adversely affected the quality of representation they provided.[121] But this belief does not make their boycott "essential political speech," entitling them to immunity under the political boycott cases. Rather, their concern about the adequacy of their incomes [52] confirms that theirs was "a boycott organized for economic ends," different in purpose from political boycotts and subject to governmental regulation. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 914–15; *see National Society of Professional Engineers v. United States*, 435 U.S. at 692–96.

We agree that effective representation for indigent criminal defendants is an important social goal. The goal is expressed in the Sixth Amendment to the Constitution, and it is implemented in the District's Criminal Justice Act. If a group of citizens who would not stand to benefit personally from an increase in CJA fees engaged in a boycott to promote this goal, their conduct might well merit immunity under the political boycott cases. But that situation is not before us. Here, where the immediate goal of the boycott—higher fees—directly benefited the participants, the respondents' attempt to elevate their "political" concerns over their own personal interests in obtaining higher fees is not convincing.

The concern of the CJA lawyers with the level of fees paid to them is familiar in a commercial setting. The same concern is evidenced by a sales clerk who, in order to earn a higher sales commission, stresses to a customer the merits of a cashmere sweater over those of a less expensive version in lambswool. Adding a public service gloss does not change the essential nature of the concern. *See National Society of Professional Engineers v. United States*, 435 U.S. at 692–96. The respondents' counsel acknowledged this in oral argument: [53]

> There [was] a Chevrolette [*sic*] sort of quality . . . service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.[122]

What the respondents are really suggesting is that they should be allowed to force their collective judgment of the appropriate price-quality mix for legal services on the city. To continue the analogy, they want the privilege to coerce the District of Columbia to pay Oldsmobile prices, so that they can profit from the result. We conclude that the respondents' purpose was promotion of their own economic interests and that their conduct is not protected political speech within the meaning of *Claiborne Hardware*.

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[121] I.D.F. 57. The Supreme Court has rejected the notion that quality of professional services necessarily is related to the level of fees charged. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 378–79 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766–69 (1976).

[122] Transcript, Oral Argument, Feb. 7, 1985, at 53.

B. *Conduct in Pursuit of Anticompetitive Goals*

Having found that the respondents' boycott was motivated primarily by their commercial interest in higher fees rather than by social or other noncommercial concerns, we next consider the applicability of the cases that involve conduct in pursuit of anticompetitive goals.[123] Under this line of authority, [54] generally known as the *Noerr-Pennington* doctrine, the First Amendment rights of association and petition protect from the antitrust laws efforts by competitors to persuade a government body or official to take action that would restrain competition. In the *Noerr-Pennington* cases, where the defendants' purpose is assumed to be competitive gain, the focus in determining whether antitrust immunity should attach is on the nature of the conduct and on the fact that government is the source of the anticompetitive restraint. The emphasis of the respondents' argument under this line of authority shifts, appropriately enough, from their assertions of selfless motivation to the fact that the boycott was directed to the city government. Regardless of their motivation, they note that "the sole purpose" of the boycott "was to influence legislation."[124]

In certain respects, this case is indeed like *Noerr* and *Pennington.* In those cases, as here, the goal of the defendants was to influence the government and the motive was anticompetitive. In *Noerr,* the defendant railroads allegedly engaged in an unfair and deceptive publicity campaign in violation of the Sherman Act aimed at changing state law and law enforcement practices. Their "sole motivation" was to injure their competitors in the trucking industry. 365 U.S. at 129. The Court said that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws," *id.* at 135, that this principle is clear [55] "at least insofar as those activities comprised mere solicitation of governmental action," *id.* at 138, and that the legality of such activity "was not at all affected by any anticompetitive purpose it may have had." *Id.* at 140. In *Pennington,* a union and certain mine operators were charged with violating the Sherman Act for having jointly "approached" the Secretary of Labor to establish a minimum wage and for having petitioned TVA officials to limit coal purchases from mines exempt from the minimum wage standard. 381 U.S. at 660–61. The Court affirmed that an anticompetitive purpose by itself is not sufficient reason to subject to the Sherman Act efforts to influence public officials. *Id.* at 669–70.

[123] To avoid confusing these cases with those addressed in the preceding section, it is important to remember two points. First, like the political boycott cases discussed in the preceding section, some of these cases involve boycotts, but, because they involve anticompetitive conduct, these are antitrust rather than political boycotts. Second, in the *Noerr-Pennington* cases, the phrase "political activity" refers to the fact that the defendants seek governmental action and does not refer to the motivation of the defendants in doing so.

[124] R.A.B. at 30.

But this case also differs from *Noerr* and *Pennington* in two major respects. First, the respondents' conduct was different. They did not merely solicit governmental action or attempt to influence the decisions of public officials through meetings or a publicity campaign. Instead, they engaged in a coercive boycott. Second, the anticompetitive effects of the respondents' activity resulted directly from the boycott itself and not from the independent action of the government. The fact that the participants in the boycott of the District's CJA program sought action from the government, therefore, does not end our inquiry. To determine whether the respondents' boycott warrants *Noerr-Pennington* immunity, we must examine the nature of their conduct. Then we will turn our attention to the source of the anticompetitive restraint. Finally, we will address certain **[56]** other cases in which the government itself has been the victim of an anticompetitive restraint.

1. Nature of the Conduct

We have found scarce authority addressing whether immunity should be granted to conduct essentially like that at issue here, but the cases do provide guidance for making that determination. The principle underlying the need for immunity is, of course, the First Amendment right to petition the government.[125] If the respondents' activity had been limited to "mere attempts to influence the passage or enforcement of laws," *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 135, then the respondents would merit the protection of the First Amendment under *Noerr* and succeeding cases. Not all methods of communicating with the government, however, are protected from the antitrust laws by the First Amendment. Because the respondents' activities were not limited to mere petitioning, we must review their conduct in light of the principles the cases have established. **[57]**

The Court in *Noerr* made clear that concern over the right to petition was paramount to its conclusion.[126] The Court recognized the legitimacy of the power of government to restrain trade and the need to protect "the ability of the people to make their wishes known to their representatives," 365 U.S. at 137, and emphasized its concern over the implicit constitutional questions in the case:

[125] The First Amendment protects freedom of speech and of the press, the right peaceably to assemble and the right to petition the government. In this opinion, we use "right to petition" to encompass First Amendment rights generally. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (First Amendment rights, "though not identical, are inseparable").

[126] At least one commentator maintains that the holding in *Noerr* was based solely on construction of the Sherman Act and that the First Amendment basis for the doctrine was not developed until *California Motor Transport*. Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 82–84 (1977).

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Id. at 138. In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510–11 (1972), the Court further examined the relationship between First Amendment rights and the scope of the antitrust laws:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors.

It is important to remember that in *Noerr,* the defendant railroads engaged only in a publicity campaign in which they used "[c]irculars, speeches, newspaper articles, editorials, magazine [**58**] articles, memoranda and . . . other documents" in an attempt to influence the government. 365 U.S. at 142.

The Supreme Court took care to distinguish the publicity campaign in *Noerr* from the kind of anticompetitive conduct at issue here. The Court said that associations that attempt to persuade the government to take particular action that would produce a restraint or a monopoly "bear very little if any resemblance to the combinations normally held violative of the Sherman Act." *Id.* at 136. The Court described the latter kind of combination as one in which

> the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Id. Notably, the Court stated that in the case before it, there were "no specific findings that the [defendant] railroads attempted directly to persuade anyone not to deal with" their trucker competitors. *Id.* at 142. These passages suggest that the Court probably would have reached a different result had the conduct before it been more akin to that before us today.

First Amendment rights are not absolute. The Court has consistently held that some conduct is subject to regulation to preserve other legitimate government interests, even though the conduct has a communicative aspect. *E.g., Roberts v. United States Jaycees,* 468 U.S. at 628. In *California Motor Transport,* the Court said that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." 404 U.S. [**59**] at 514. In *Claiborne Hardware,* the Court explained that "[g]overnmental regulation that has an inciden-

tal effect on First Amendment freedoms may be justified in certain narrowly defined instances." 458 U.S. at 912, *citing United States v. O'Brien*, 391 U.S. 367 (1968). Even though the "regulation may have an incidental effect on rights of speech and association . . . [t]he right of business entities to 'associate' to suppress competition may be curtailed." 458 U.S. at 912, *citing National Society of Professional Engineers v. United States*, 435 U.S. at 697.

There are many different ways to communicate, ranging along a broad spectrum from pure speech to violent actions. In this case, for example, the respondents initially chose to communicate their collective view that an increase in the CJA fees was desirable by speaking to members of the city government and other individuals who were thought to be influential.[127] Although some commentators have suggested that such activity alone should be unlawful,[128] we need not and do not address that question here. We think it is clear, however, that if the respondents had elected to kidnap a city official and to hold him hostage until their demands were granted, their conduct would be subject to governmental regulation, despite its communicative aspect. *See* [60] *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. at 933; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949) (no "constitutional right . . . to violate valid laws designed to protect important interests of society"); *Thomas v. Collins*, 323 U.S. 516 (1945).[129] The mere fact that the purpose of the scheme was to obtain governmental action would not change the character of the conduct from unlawful kidnapping to speech protected from regulation by the First Amendment.[130]

To help us determine where the boycott of the CJA program should be placed on the spectrum of ways to communicate, let us briefly return to the competitive context in which it occurred. The city, in order to fulfill its constitutional obligation to provide counsel to indigent defendants, offered to pay a fee to attorneys under the city's CJA program. Before the boycott, the number of lawyers who responded

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[127] I.D.F. 37–40.

[128] P. Areeda & D. Turner, *Antitrust Law* ¶ 205, at 51–52 (1978) (hereafter "Areeda & Turner"), suggest that discussions among competitors concerning an appropriate price for their product in order to petition government for price support legislation "should constitute unlawful price collaboration, because their discussions create a severe danger for competition without being, in any way, indispensable for conducting protected political activity." *Id.* at 52.

[129] In *Thomas v. Collins*, 323 U.S. at 537–38, the Court said that attempts to persuade are within the First Amendment, but "[w]hen to this persuasion other things are added which bring about coercion, . . . the limit of the right has been passed."

[130] *See* note, *Noerr-Pennington Immunity from Antitrust Liability Under Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.: Replacing the Sham Exception with a Constitutional Analysis*, 69 Cornell L. Rev. 1305, 1323–25 & 1324 n.130 (1983):

> If a [terrorist kidnapping or the bribery of a public official] is undertaken with a genuine desire to influence governmental decisionmaking, then it is bona fide petitioning activity. However, it would be ludicrous to assume that such behavior merits protection under the first amendment given the government's overriding interest in restricting such behavior.

to the city's offer was apparently sufficient to meet the city's needs.[131] At least, [61] the city saw no need to increase the offering price to attract a greater number of lawyers.[132] None of the lawyers who served the city's CJA program was obligated to accept the city's price. Each was free to sell his services to the city or to seek clients elsewhere. If too few lawyers responded to the city's offering price, then presumably the city would independently have determined to increase its offering price. The boycott of the CJA program disrupted this competitive process. The resulting anticompetitive effects were immediately felt by the city, because the number of lawyers willing to accept employment at the city's offering price shrank dramatically.[133]

This disruption of the normal channels of government decisionmaking is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it.[134] Lobbying is an attempt to influence or persuade or inform, where the channels of government are open to conflicting views and where the government, although presumably responsive to the concerns of constituents, retains its authority to weigh competing [62] considerations and to determine policy independently. The respondents abandoned their attempts to persuade the government to act when the city failed to act favorably to their interests. They elected instead to engage in a coercive price-fixing boycott to get their way. Clearly, they went beyond persuasion as a technique to influence the government. The CJA lawyers successfully forced the city government to resolve the crisis in the city's criminal justice system, that the lawyers themselves intentionally had created, in the manner they demanded.

The Administrative Law Judge suggested that the respondents' abandonment of persuasion in favor of coercive conduct was justified because their pre-boycott efforts to obtain a fee increase were unsuccessful.[135] We reject this suggestion. Virtually every issue a government entity must address will involve resolution of conflicting views of what the result should be. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144–45. The First Amendment right to petition the government does not include the right to be effective.

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[131] During the strike, only three or four CJA lawyers called in daily. *See* note 43 *supra*.

[132] The record shows that in 1982 and in 1983 before the boycott, the city considered but did not enact legislation that would have increased the CJA fees because of lack of money to fund such an increase. *See* I.D.F. 36, 42 & 43. Nevertheless, the CJA system worked until the respondents instituted their boycott. *See* I.D.F. 60–62 & 70.

[133] I.D.F. 60 n.187 & 61.

[134] Areeda & Turner, *supra* note 128, at 52, suggest that *Noerr* immunity should not extend to conduct that creates a severe danger to competition, when less dangerous alternatives are obviously available and the conduct is not a customary form of lobbying.

[135] *See* I.D.F. 34. Judge Needelman's decision implicitly suggests that the preboycott price was unreasonable and that the boycott was therefore in the public interest. Neither of these implicit justifications is cognizable under the antitrust laws. *See National Society of Professional Engineers v. United States*, 435 U.S. at 692–96; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 218–23; *see also Michigan State Medical Society*, 101 F.T.C. 191, 293 (1983).

The means employed by the respondents were those usually held unlawful under the antitrust laws: collective action by [63] competitors to set the terms at which they will sell. *See, e.g., Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978). As the Court said in *Pennington,* "It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that runs counter to antitrust policy." 381 U.S. at 668. In both *Noerr* and *Pennington,* the Court distinguished precisely this kind of private action in restraint of trade from petitioning that is immune from the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. at 136; *United Mine Workers v. Pennington,* 381 U.S. at 668.

We think that *Noerr* and *Pennington* alone provide sufficient guidance for our conclusion that First Amendment immunity should not extend to the kind of conduct in which the respondents have engaged. We would reach the same conclusion, however, under a general First Amendment analysis of expressive conduct. The standard for determining whether a person's conduct that is intended to communicate merits First Amendment protection was articulated in *United States v. O'Brien,* 391 U.S. at 377:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

We conclude, after applying this four-part test, that no immunity is justified in this case. [64]

The federal antitrust laws easily satisfy the first three criteria. First, Congress is empowered to enact the Sherman Act and the Federal Trade Commission Act under its constitutional authority to regulate commerce.[136] Second, the governmental interest underlying these Acts, which is the protection of uninhibited competition, has long been accepted as important or substantial.[137] Third, the policy underlying the antitrust laws plainly is unrelated to the suppression of free expression.[138] Finally, application of the Federal Trade Com-

[136] United States Constitution, Art. I, § 8, cl. 3. "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398 (1978) (footnotes omitted).

[137] "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC,* 340 U.S. 231, 248 (1951).

[138] The Sherman Act can be distinguished, for example, from a statute prohibiting "displays [of] any flag, badge, banner, or device . . . as a sign, symbol or emblem of opposition to organized government." Such a statute, which regulates conduct because the message communicated by the conduct is itself thought to be harmful, is unconstitutional. *United States v. O'Brien,* 391 U.S. at 382, *citing Stromberg v. California,* 283 U.S. 359 (1931).

mission Act to the respondents' conduct will not materially inhibit the respondents' right to free expression. The respondents can present their views and arguments to the District government in person, through others or through a varied campaign of publicity. We have weighed the strong government interest in prohibiting restrictions on competition, such as the respondents' coercive economic tactics, against any negligible inhibitions [65] that application of the law here might impose on the respondents' freedom of expression. On balance, we conclude that any restriction this enforcement action might impose on the respondents' First Amendment freedoms is incidental at best and no greater than is essential to the furtherance of the government's interest in protecting competition. *See, e.g., National Society of Professional Engineers v. United States,* 435 U.S. at 696–99.

The respondents assert that, consistent with the reasoning in *Crown Central Petroleum Corp. v. Waldman,* 486 F.Supp. 759 (M.D. Pa.), *rev'd on other grounds,* 634 F.2d 127 (3d Cir. 1980), even boycotts to advance the participants' own economic interests are protected speech exempt from the antitrust laws under the *Noerr-Pennington* doctrine.[139] In *Crown Central,* a group of independent gasoline retailers agreed to close their service stations for three days for the purpose of influencing the U.S. Department of Energy to raise the existing gasoline price ceiling. The court held that the boycott was protected from the antitrust laws by the First Amendment as symbolic speech. On the same facts, the court in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association,* 499 F.Supp. 553 (D. Del. 1980), concluded that "a boycott, along with its communicative component, has a coercive economic effect which ordinarily may be regulated without serious jeopardy to First Amendment interests." *Id.* at 557–58. The *Osborn* court's reasoning appears [66] to be consistent with *O'Brien, Claiborne* and numerous other cases:

> [W]hen speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms so long as that interest "is unrelated to the suppression of free expression."

499 F.Supp. at 557, *citing United States v. O'Brien,* 391 U.S. at 376–77. Faced with the conflicting opinions in *Crown Central* and *Osborn,* we find that the analysis of the *Osborn* court is more consistent with precedent and is more persuasive.[140]

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[139] R.A.B. at 29.

[140] Professor Areeda agrees "more with the balance struck by *Osborn* than with that adopted by *Crown Central.*" P. Areeda, *Antitrust Law* ¶ 205, at 34 (Supp. 1982). *See also* note, *Commercial Entities and Political Boycotts: First Amendment Protections Versus Sherman Act Prohibitions,* 14 Conn. L. Rev. 391, 407–08 (1982).

2. Source of the Anticompetitive Restraint

All of the cases we have addressed in the preceding section differ from the instant case in one important respect: in none of them was the government itself the economic—as opposed to the political—target of the boycott. In the case before us, the anticompetitive effects of the respondents' boycott resulted not from the independent action of the government but from the collective action of the CJA lawyers. The fact that anticompetitive restraints would be brought about by governmental rather than private action was the basis for a crucial [67] distinction in *Noerr* and *Pennington* that is plainly absent here.

In *Noerr,* the Court said that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." 365 U.S. at 136, *citing Parker v. Brown,* 317 U.S. 341 (1943). The reason for this, according to the Court, is that "the question whether a law of that kind should pass . . . is the responsibility of the appropriate legislative or executive branch of government . . . ." 365 U.S. at 136. In *Pennington,* the union and certain mine operators jointly petitioned the Secretary of Labor to establish a minimum wage for coal miners and petitioned the TVA to limit coal purchases from mines exempt from the minimum wage standard. In denying relief, the Court observed that "the action taken to set a minimum wage for government purchases of coal" was the independent decision of a public official. 381 U.S. at 671.

In the usual case in which the *Noerr-Pennington* doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the market. Usually, the goal has been to persuade the government, for whatever reasons and in response to whatever political influences, to impose requirements causing competitive harm to the buyers, sellers or other players in a market operating in the economy at large. Here, the government is itself a player in the relevant line of commerce and has been coerced as a customer—indeed, the only customer—in the market for CJA services. The fact that the government is involved is incidental to its role as [68] a buyer in the marketplace.

The principle underlying the decision in *Noerr,* that immunity under the antitrust laws is contingent on a showing that the government imposed the restraint of trade, is the same principle that provides the basis for decision in those cases dealing with the "sham" exception to the *Noerr-Pennington* doctrine. In *California Motor Transport,* for example, the "sham" exception was held to apply because private rather than governmental action had restrained trade and because the normal channels of government had been disrupted

by the private restraint of trade. 404 U.S. at 511–16.[141] The defendants in *California Motor Transport* allegedly acted to bar their competitors from access to adjudicatory tribunals and "so to usurp that decisionmaking process." *Id.* at 512. The alleged result was that the defendants, instead of government, "became 'the regulators of the grants of rights' " to the plaintiffs. *Id.* at 511.

Judge Needelman found, and we agree, that the boycott of the CJA program forced the District government to act to increase the CJA fees,[142] an action that the city previously, in its [**69**] discretion, had declined to take. As sellers, the respondents acted in concert to compel their customer, the city, to pay a higher price. Unlike *Noerr* and *Pennington,* here the respondents by their boycott successfully substituted their collective view of an appropriate price for that determined by the government. The restraint was *on* the government, not *by* the government.

3. The Government as Victim

The conduct in which the respondents have engaged would be unlawful where the victim of the boycott is not the government, and no policy reason supports an immunity from the antitrust laws simply because the government is the target. The denial of *Noerr* immunity here is consistent with the right of state and municipal governments to sue for treble damages to protect themselves from violations of the antitrust laws. *Georgia v. Evans,* 316 U.S. 159 (1942); *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906).[143] Professors Areeda and Turner have stated that the denial of immunity when government is the victim is consistent with the policy of the *Noerr* doctrine:

> The fact that the government is the victim of an otherwise improper act by a private party cannot immunize the actor. Immunity would be inconsistent with the state and federal government's statutory right to damages for injuries resulting from antitrust violations. More fundamentally, immunity would lack any policy justification. . . . A concern for keeping government channels open [**70**] and available to all, including this particular seller, is not relevant in this context and thus not ground for permitting what would be condemned in dealing with any other buyer.[144]

The government was both victim and customer in *COMPACT v.*

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[141] *See also* P. Areeda, *Antitrust Law* ¶ 203.1a, at 5 (Supp. 1982) (injury from "sham" activity results directly from antitrust defendant's activity, rather than from governmental action).

[142] I.D.F. 61 & 70.

[143] The United States may recover actual damages for antitrust violations. Section 4A of the Clayton Act, 15 U.S.C. 15a.

[144] Areeda & Turner, *supra* note 128, ¶ 206b, at 53 (footnotes omitted); *see also* note, *Application of the Sherman Act to Attempts To Influence Government Action,* 81 Harv. L. Rev. 847, 848 (1968) ("no substantial reasons to distinguish attempts to influence private commercial conduct, to which the antitrust laws clearly apply, from efforts to influence the government in its role as a customer").

Metropolitan Government of Nashville, 594 F.Supp. 1567, 1572–83 (M.D. Tenn. 1984), *appeal pending,* where three black architectural firms joined together to "present a united front" for negotiating minority participation on selected construction projects. *Id.* at 1569. The three firms were allegedly the only black-owned architectural firms in the area and, until they formed COMPACT, had bid against one another for minority business set-aside shares on public contracts. The two projects initially targeted by the group were public projects. The court denied *Noerr* immunity to the architectural firms, on the ground that the Constitution does not protect "*commercial* activity by businessmen when dealing with government in its *proprietary* capacity." *Id.* at 1573. The court noted that the architects might have sought to achieve their goal of increasing minority participation by lobbying the state legislature or Congress. Instead, they chose to negotiate jointly with the government contractor. The court [71] said, "COMPACT's actions were taken in the marketplace" and are not immune from the Sherman Act. *Id.*[145]

Some courts have declined to grant *Noerr* immunity to private parties when they deal with government acting in a commercial capacity instead of in its policy-making role. *E.g., Hecht v. Pro-Football, Inc.,* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970). Two courts have granted *Noerr* immunity where the government was a participant in the market, but in neither case was the government the victim of private restraints. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985); *In re Airport Car Rental Antitrust Litigation,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 462 U.S. 1133 (1983). We would reach the same result in these two cases under the analytical framework we have used in this opinion—that is, we would find that the *Noerr-Pennington* doctrine applies. Both cases involved challenges to restrictive airport concessions granted by municipalities to private parties. In each case, the restraint on competition emanated from the government, not from private action. In addition, the allegedly unlawful conduct appears to be petitioning of government, not coercion of government. The court's conclusion in *Airport Car Rental* that "the nature of the [72] government activity is one factor in determining the type of public input acceptable to the particular decision-making process," 693 F.2d at 88, is consistent with our own.

In the instant case, the city was the purchaser of CJA services. The government, like any other buyer, has an interest in obtaining the

[145] *See also City of Atlanta v. Ashland-Warren, Inc.,* 1982–1 Trade Cas. (CCH) ¶ 64,527, at 72,928 (N.D. Ga. 1981) (nature of conduct and role of government are factors in determining applicability of *Noerr*).

requisite supply at a competitive price. Here, the District government effectively expressed this interest by repeatedly declining, on budgetary grounds, to increase the CJA fees. Like any other customer subject to a price-fixing conspiracy, the government, during the respondents' boycott, was unable to obtain a competitive price. Permitting a price-fixing boycott directed at the government as buyer does not foster the *Noerr* goal of free exchange of information between people and the government. At the same time, prohibiting such conduct does not interfere with anyone's ability to choose to sell his services to the government or to make his views on the appropriate price known to the government.

We hold that the respondents are not immune from liability under the *Noerr-Pennington* doctrine. The CJA lawyers are a group of sellers who, when unable to obtain a satisfactory price for their services through noncoercive efforts to persuade the government, elected to participate in an explicit price-fixing boycott. The mere fact that the government, as the only purchaser of CJA services, was the target does not protect their boycott from regulation. An order prohibiting the respondents from engaging in a price-fixing boycott of the city's CJA program [73] will protect the governmental interest in free competition and will not adversely affect the respondents' ability to exercise their First Amendment right to petition the government.

III. THE ORDER

We have concluded that the concerted refusal to deal by SCTLA and the individual respondents for the purpose of increasing the CJA fees constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Having found a violation of the Act, the Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. The order must, of course, be reasonably related to the violation found to exist. *See, e.g., F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs I.B, I.C and I.D of the order require the respondents to cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions

are clearly related [74] to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Paragraph I of the order specifically provides that nothing in the order shall prevent the respondents from exercising their rights under the First Amendment to petition the government concerning any legislation, rules or procedures. Although in our view, the cease and desist provisions of the order are sufficiently narrow that they do not inhibit the respondents' constitutional right to petition, we include this proviso in the interest of clarity. *See National Society of Professional Engineers v. United States,* 435 U.S. at 697–98 & note 27.

Paragraph II of the order provides that notice of the order be given to the members and officers of the Superior Court Trial Lawyers Association. For the purpose of notifying CJA lawyers who may not have registered their addresses with the SCTLA, the order requires that a copy be posted for a limited time in the same place that SCTLA notices are customarily posted. Paragraphs III, IV and V set forth the respondents' compliance obligations under the order. These provisions are designed to assist the Commission in monitoring compliance with the order and they impose only a minimal burden on the respondents.

The respondents claim, without citing authority for the proposition, that an order should not issue against SCTLA because it is not an "association" within the meaning of Section 4 of the [75] FTC Act, 15 U.S.C. 44.[146] The law provides that an unincorporated voluntary association is subject to the Commission's jurisdiction. *See National Harness Manufacturers' Association v. FTC,* 268 F. 705, 708–09 (6th Cir. 1920); *see also United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344, 383–92 (1922). The record shows as a matter of fact that the SCTLA is an association. *See, e.g., Ripon Society v. National Republican Party,* 525 F.2d 567, 571 n.5 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976); *Georgia v. National Democratic Party,* 447 F.2d 1271, 1273 n.2 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971).

Although the SCTLA is a loosely knit organization, the Association has officers, holds meetings, collects dues, maintains a bank account and helps to promote the pecuniary and other interests of its members, CJA lawyers.[147] At a minimum, the SCTLA provided a "rallying point"[148] for the 1983 boycott. The officers of SCTLA presented themselves and were perceived as spokesmen for the SCTLA lawyers. The vote to strike if the fees were not increased and the vote to resume work if the city increased the CJA fee to $35 were taken at SCTLA meetings, presided over by SCTLA officers. The Association was inte-

[146] R.A.B. at 55–56.
[147] I.D.F. 1–4.
[148] I.D.F. 1.

grally involved in the boycott. Although the structure of the SCTLA may vary over time, it has been in existence for at least ten [76] years,[149] and there is no reason to conclude that the SCTLA will not continue to be active as an organization for the interests of the CJA lawyers. We conclude that the SCTLA is an association within the meaning of the Act and that it is appropriate to name the SCTLA in the order.

The respondents also claim that an order against the SCTLA would "pose serious due process problems of notice,"[150] because CJA lawyers have no way of knowing whether they are members of the SCTLA or whether they may be held responsible for the acts of others on behalf of the Association. The order, however, does not impose liability merely for the use of SCTLA facilities or for knowledge of the unlawful conduct of another.[151] The respondents would violate the order only if they themselves engaged in concerted action prohibited by the order or if they authorized an agent to engage in such conduct on their behalf. The Association now exists, and it has officers and members. The Commission is empowered to issue an order requiring the respondents to cease and desist from their unlawful conduct, and the order provides for notice to them. We perceive no problem of lack of notice in those provisions.

An order is appropriate to prevent a recurrence of the violation. The SCTLA, its members and the individual respondents were active participants in and organizers of the strike. At the [77] time of the hearing, Mr. Perrotta, Ms. Koskoff, and Mr. Addison were officers of the SCTLA. Although Ms. Slaight, the chairperson of the SCTLA strike committee, left CJA practice after the boycott and entered private employment away from Washington, she has since returned to the District and is once again accepting cases under the CJA.

The circumstances that gave rise to the SCTLA lawyers' demands for increased CJA compensation levels have not changed substantially. The record demonstrates that some of the respondents and other CJA lawyers believe that CJA rates are still too low.[152] The federal CJA fees, as amended in 1984, are now higher than the District's CJA fees. Although legislation has been introduced in the City Council to raise the CJA fees to the levels first demanded by the SCTLA lawyers, the legislation has not been enacted. The CJA lawyers boycotted the CJA program twice before the 1983 boycott.[153] One of the boycotts, like that in 1983, was for the purpose of increasing fees. The other boycott was sparked by complaints that judges were mistreating CJA

[149] I.D.F. 2.
[150] R.A.B. at 56.
[151] *Id.*
[152] I.D.F. 65; JX 10, at 80; JX 13, at 128; CX 43B.
[153] JX 6, at 61; O'Neill Tr. 557.

lawyers, but economic issues emerged as well.[154] The entry of an order is appropriate to prohibit the respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process. [78]

The respondents object also to the entry of paragraph IV of the order, requiring the individual respondents to notify the Commission, for a period of five years, of any change in their law practice. According to the respondents, this provision is "pure harassment" and "serves no legitimate purpose."[155] We disagree. The order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants. Because the level of fees for such legal services in other jurisdictions is similar to or lower than the fees in the District of Columbia, the individual respondents may have a financial incentive to engage in similar conduct in other locales. For example, the fees under the federal Criminal Justice Act continued to be $20 and $30 per hour for one year after the SCTLA lawyers had succeeded in raising the District's fee to $35 an hour. In 1983, the fees in Maryland were $20 and $25. The fees in New York, where Ms. Slaight lived for several years after the boycott, were $15 and $25. The maximum in Virginia for a felony case was $400, less than half of the District's $1000 fee.[156] We conclude that this provision of the order also is reasonably related to the violation in this case and appropriate to prevent a recurrence of the violation. [79]

The respondents have demonstrated no recognition that a price-fixing boycott is an unlawful means by which to seek increased reimbursement rates from the government. *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Under these circumstances, there is a cognizable risk that the unlawful conduct will be repeated by these respondents absent an order to cease and desist. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1945).

CONCLUSION

The respondents disrupted the criminal justice system in the District of Columbia and coerced the District government into raising the fees paid to them under the Criminal Justice Act. This coercive, concerted refusal to provide legal services to the District government unless and until the fees for those services were raised constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The Administrative Law Judge concluded

[154] Perrotta Tr. 672; JX 11, at 112–115. The record does not tell us anything more about the previous boycotts.

[155] R.A.B. at 59.

[156] CX 38J. This exhibit, showing a state-by-state breakdown of fees for indigent criminal cases, is reprinted in Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 240–41 (1983).

that the disruption of the criminal justice system and the additional cost to the city for the CJA program were not "adverse effects," because the District government assertedly supported an increase in CJA fees. We find neither legal nor factual support for this conclusion. Accordingly, we reverse the Administrative Law Judge's decision and issue the attached order against SCTLA and the individual respondents.

Final Order

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to grant the appeal and reverse the initial decision. Accordingly, [2]

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be rejected except as specifically adopted in the findings of fact and conclusions of law contained in the accompanying opinion. The findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered:

I.

It is ordered, That respondent Superior Court Trial Lawyers Association, an association, its successors and assigns, and its officers, directors and members; Ralph J. Perrotta, individually and as a director of Superior Court Trial Lawyers Association; Karen E. Koskoff and Reginald G. Addison, individually and as officers of Superior Court Trial Lawyers Association; Joanne D. Slaight, individually; and respondents' agents or representatives, directly or through any device, in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to: [3]

A. Refuse to provide legal services to any government program that provides legal services for persons eligible for appointed counsel in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for such legal services;

B. Interfere with the operation of the Superior Court of the District

of Columbia or of any court or of any government agency in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

C. Coerce any person not to provide or discourage any person from providing legal services in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

D. Encourage, suggest, advise, or induce respondent Superior Court Trial Lawyers Association, any member of Superior Court Trial Lawyers Association, or any other person to engage in any action prohibited by this order;

Provided, That nothing in this order shall prevent respondents from: [4]

(1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or

(2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

II.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall:

A. Distribute by first-class mail a copy of this order to each of its members, officers and directors within thirty (30) days after this order becomes final;

B. Distribute by first-class mail a copy of this order to each person who becomes a member, officer or director of Superior Court Trial Lawyers Association within thirty (30) days of such person's becoming a member, officer or director, during each of the first three (3) years after this order becomes final; and [5]

C. Within thirty (30) days after the order becomes final and for ninety (90) days thereafter, post a copy of this order in each location in which notices of meetings of respondent Superior Court Trial Lawyers Association are customarily posted.

III.

It is further ordered, That the respondents herein shall within sixty (60) days of service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in

which they have complied and are complying with this order, and shall file such other reports of compliance as the Commission may from time to time require.

IV.

It is further ordered, That each of the individual respondents named herein shall, for a period of five years after this order becomes final, promptly notify the Commission of the discontinuance of his or her present legal practice, business or employment and his or her affiliation with a new legal practice, business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the legal practice, business or employment in which the respondent is newly engaged. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [6]

V.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall notify the Commission at least thirty (30) days before any proposed change in its form of organization that may affect compliance obligations arising out of this order.

Chairman Oliver and Commissioner Strenio did not participate.

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